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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

### OCTOBER TERM, 1906.

## No. 158.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY AND THE MAYSVILLE AND BIG SANDY RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

J. W. McDONALD, ADMINISTRATOR OF NANCY J. WILSON, DECEASED.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED AUGUST 10, 1907.

(20,824.)

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1 THE COMMONWEALTH OF KENTUCKY:

Pleas before the Honorable the Court of Appeals, at the Capitol, at Frankfort, on the 25th Day of April, A. D. 1905.

NANCY WILSON'S ADM R., Appellant,
*vs.*
CHESAPEAKE AND OHIO RAILWAY CO., ETC., Appellees.

Appeal from Lewis Circuit Court.

Be it remembered that on the 6th day of December 1904, the appellant by his attorney filed in the office of the Clerk of the Court of Appeals, a transcript of the record and which is in words and figures as follows:—

2 Pleas before Hon. James P. Harbeson, Judge of the Lewis Circuit Court for the Nineteenth Judicial District of Kentucky, at the Court House, in Vanceburg, Kentucky, on the 19th Day of May, 1904.

Be it remembered that on the 23rd day of March, 1900, the plaintiffs, J. B. Wilson and J. W. McDonald, Administrators of the estate of Nancy J. Wilson, deceased, produced and filed in the Clerk's office of the Lewis Circuit Court their original petition against the defendants, The Chesapeake and Ohio Railway Company, and the Maysville and Big Sandy R. R. Company and Frank Fish and James McCloud, Conductors, and —— Fairhead and —— Fox, Engineers, and —— ——, Fireman, and upon the back of which appears the following endorsement, "Filed March 23rd, 1900. Sums. and copy issued to Lewis; Sums. and copy issued to Mason."

Said petition is in words and figures as follows:

*Petition.*

Lewis Circuit Court.

J. B. WILSON & J. W. MCDONALD, Adm'rs of the Estate of Nancy J. Wilson, Deceased, Plaintiffs,
*vs.*
3 THE CHESAPEAKE AND OHIO RAILWAY COMPANY, & THE MAYSVILLE & BIG SANDY R. R. CO., and FRANK FISH, and JAMES MCCLOUD, Conductors, and —— FAIRHEAD and —— FOX, Engineers, and —— ——, Fireman, Defendants.

Defendants, The Chesapeake & Ohio Railway Company, a corporation created, organized and doing business under the laws of Virginia and West Virginia, and The Maysville & Big Sandy R. R. Co.,

a corporation created, organized and doing business under the laws of the State of Kentucky; that said corporations are now and at the times hereinafter stated were corporations as aforesaid.

Defendant, Maysville & Big Sandy R. R. Co., at the times hereinafter stated owned and now owns, a line of railway extending through the County of Lewis, and other counties in this Commonwealth. Said Railway is and at the times hereinafter stated was constructed through the farm bordering on the Ohio River, once owned by Mason Wilson, the husband of the said Nancy J. Wilson, deceased, who himself has long since been dead.

Said Railway is, and at the times hereinafter stated was, constructed upon and across the public highway leading through said farm to the Ohio River, and the public road leading to the Ohio River, known as the Lawson Hollow Road, and which highway at the times hereinafter stated were and had been long theretofore much used and frequently traveled by many people, and were
4 known to be by said Maysville & Big Sandy R. R. Co., and its agents and employés, and the said Chesapeake and Ohio Railway Co., and its employés and agents and said road through the said farm of said Wilson was at the times hereinafter stated the only avenue for ingress and egress to and from said farm and home of said Nancy J. Wilson, by and to the public road and highway leading to a Post Office.

At and before the times hereinafter stated and from a time before the year 1890, said railway was operated by defendant, Chesapeake and Ohio Railway Company, under the lease of contract thereof made to it by defendant, The Maysville and Big Sandy R. R. Co., and not otherwise, the exact terms of said lease or contract being unknown to plaintiffs. Said lease was made without legal authority and without authority or warrant, and same therefore was, and is, void; by the terms of said lease said Maysville and Big Sandy R. R. Co., attempted to let, transfer and convey for a term of years, which is yet unexpired, the said Railway to defendants, The Chesapeake and Ohio Railway Company.

Defendant, The Maysville and Big Sandy R. R. Co., had heretofore before the making of said lease, *contracted* said railway under grants of authority and franchise granted to it by its charter and amendments thereto, enacted by the General Assembly of the Commonwealth of Kentucky, empowering said Maysville and Big
5 Sandy R. R. Co., and it alone, to operate said Railway. At the time hereinafter stated defendants did not have at or near the said crossings of said roads by railway, any watchman, gate nor any device or ap-aratus, or means of any kind to warn travelers upon said public highway of the coming of locomotives, engines or cars upon said railway, nor to protect such travelers from injury from such locomotives, engines or cars.

On the second day of September, 1899, Nancy J. Wilson was a traveler upon said highway upon and across the said Wilson farm to her home on said farm, and in so traveling upon said highway where the same crosses said Railway for the purpose of crossing or passing over the same, and then and there all the defendants with

gross and wanton negligence, and in a gross and wantonly negligent manner drove, ran and operated upon said railway and across said public highway so passing through said Wilson farm, a locomotive and engine and train of cars, and in so doing the defendants with gross and wanton negligence struck said Nancy Wilson with said locomotive, engine and cars upon said public highway, passing through said Wilson farm, and thereby said Nancy Wilson was so injured that she soon thereafter died thereof.

The defendants at the time and place aforesaid with gross and wanton negligence, drove, ran and operated said locomotive, engine and cars upon, over and across said two public highways with
6 great excessive and dangerous speed, to-wit: at the rate of sixty miles or more an hour, and with gross and wanton negligence defendants failed to keep or have upon said locomotive, engine or train a proper, or any, look out for travelers upon said public highway, or either of them, and with gross and wanton negligence the defendants failed to give either from or by said locomotive engine or train or otherwise, any notice, signal or warning of any kind of the approach of said locomotive, engine or cars to said public highway and crossing, or either of them, or to the said crossing through said Wilson farm, or of the approach thereof to, or the running thereof upon said public highway and crossing and road through said Wilson farm; and with gross and wanton negligence defendants then and there failed to have at or near said crossings or either of them, any watchman, gate or other device, apparatus or means to warn travelers upon said public highways and said crossing through said Wilson farm or either or any of them so as aforesaid named of the coming of locomotives, engines or cars upon said railway to protect travelers upon said public highways through said Wilson farm, and said other highways, from injury by locomotives, engines or cars moving upon said railway; and the defendants were at the times and place aforesaid in many other ways and in many other respects grossly and wantonly negligent, and because of all of said
7 negligence said Nancy J. Wilson was injured and her life destroyed as aforesaid.

All said negligence heretofore mentioned, except the failure to have at or near said crossings a watchman, gate or other device, ap-aratus or means to warn or protect travelers upon said public highway of the coming of or from injury from locomotives, engine or cars moving upon said railway, was done by and through the defendants Frank Fisher, James McCloud, —— Fairhead, —— Fox and —— Snedager, who were at the time and place aforesaid respectively, conductor, engineer and fireman of said locomotive, engine and train, and were then and there the agents and servants of the defendant, the Chesapeake and Ohio Railway Company, employed by said corporation as conductor, engineer and fireman of and upon said locomotive, engine and train, and are now residents and citizens of this State of Kentucky.

By the destruction of the life of said Nancy J. Wilson, as aforesaid, her estate was damaged in the sum of ten thousand dollars, $10,000.00.

On the day of January, 1900, plaintiffs were in and by the County Court of Lewis County, Kentucky, being the county wherein Nancy J. Wilson resided and was domiciled at the time of her death, duly appointed and they then and there duly qualified as administrators of the estate of the said decedent and they are still such administrators.

Plaintiffs pray judgment for ten thousand dollars and costs.

8 *Summons.*

The Commonwealth of Kentucky to the Sheriff of Mason County, Greeting:

You are commanded to summons The Maysville and Big Sandy Railroad Company to answer on the first day of the next May Term of the Lewis Circuit Court, a petition filed against it in said Court by J. B. Wilson & *al.*, Administrators of Nancy J. Wilson, deceased, and warn it that upon its failing to answer, the petition will be taken for confessed, or it will be proceeded against for contempt, and you will make due return of this summons on the first day of the next May term of said Court.

Given under my hand as clerk of said court, this 23rd day of March, 1900.

EUGENE A. JONES, *Clerk.*

*Officer's Return.*

Accepted this 26th Mch., 1900.

W. H. WADSWORTH.

*Summons.*

The Commonwealth of Kentucky to the Sheriff of Lewis County, Greeting:

You are commanded to summon The Chesapeake and Ohio Railway Company, to answer on the first day of the next May term of the Lewis Circuit Court, a petition filed against it & *al.*, in
9 said court, by J. B. Wilson & *al.*, Adm'rs, of Nancy J. Wilson, deceased, and warn it that upon its failure to answer, the petition will be taken for confessed or it will be proceeded against for contempt, and you will make due return of this summons on the first day of the next May term of said court.

Given under my hand as clerk of said court, this 23rd day of March, 1900.

EUGENE A. JONES, *Clerk.*

*Officer's Return.*

Executed within summons by delivering a true copy thereof to J. W. Mathewson, agent for the Chesapeake and Ohio Railway Company, at Vanceburg, Ky., on the 24th day of March, 1900.

M. BERTRAM, *S. L. C.*

At a circuit court began and held for Lewis County, at the Court House in Vanceburg, on the 22nd day of May, 1900, the following order was made:

*Order Noting Pet. for Removal of Cause to the U. S. Court.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & ALS., Defendants.

The defendant, The Chesapeake and Ohio Railway Com-
10 pany, this — produced and filed its petition and bond in conformity to the Statutes in such cases made and provided, and before its answer herein was due under the laws of the State of Kentucky, and moved the Court to enter an order transferring this cause to the United States Circuit Court for the District of Kentucky, and to proceed no further that said orders in the cause to the making of which order the plaintiffs objected and the court not being sufficiently advised took time.

At a Circuit Court begun and held for Lewis County at the Court House at Vanceburg, on the 29th day of May, 1900, the following order was made:

*Order Transferring Cause to U. S. Court.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & AL., Defendants.

The motion to transfer this cause to the United States Circuit Court coming on to be heard, and the Court being sufficiently advised, it is adjudged that the bond entered herein be and it is hereby approved, that this cause be transferred to the United States
11 Circuit Court, and that this court proceed no further herein. The plaintiffs object and except to the foregoing order.

At a circuit court began and held for Lewis County, at the Court House in Vanceburg, on the 1st day of September, 1902, the following order was made:

*Order Noting Answer.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & AL., Defendants.

The defendants this day produced their answer herein which is filed. Said answer is as follows:

*Answer.*

Lewis Circuit Court.

J. B. WILSON & ALS., Plaintiffs,
*vs.*
CHESAPEAKE & OHIO RY. CO. & ALS., Defendants.

The defendants, the Chesapeake & Ohio Ry. C-., and Maysville and Big Sandy R. Co., come and for answer to plaintiffs' petition deny that the railway of the defendant, the Maysville and Big Sandy Railroad Company, described in the petition, is or was at any time constructed upon or across a public highway leading through the farm of Mason Wilson, the same described in the petition, to the Ohio River or to the public road leading to the Ohio River known as the "Lawson hollow road." They deny that there is any public highway leading through said farm to the Ohio River, or to the public road known as the "Possum Hollow Road," and they deny that said alleged highways, or either of them, at the times stated in the petition were, or had been long theretofore much used or frequently traveled by many people, or were known to be by said Maysville and Big Sandy Railroad Co., or its agents or employés, or the said Chesapeake and Ohio Railway Company, or its agents or servants; and they deny that the said road through said farm of said Wilson was, at the times hereinafter stated, the only avenue for ingress and egress to or from said farm or home of Nancy J. Wilson, by or to the public road or highway leading to a post office.

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They deny that the lease set up in the petition between the Chesapeake and Ohio Railway Company and the Maysville and Big Sandy Railroad Company, was made without legal authority, or without authority or warrant, or that the same is void. They deny that the Charter authority and amendments of the Maysville and Big Sandy Railroad Co. empowered it alone to operate said railway. They deny that at the times mentioned in the petition the defendants did not have at or near the place or crossing of the railroad over the alleged highway, any means to warn travelers on said public highway, of the coming of locomotives, engines or cars upon said railway, or to protect such travelers from injuries from such locomotives, engines or cars. They deny that on the 2nd day of September, 1899, Nancy J. Wilson, the decedent, was a traveler upon any highway upon or across the said Wilson farm, to her home on said farm, or that while so travelling upon any such highway where the same crosses the railroad for the purpose of crossing or passing over the same, or any other place, the defendants, or any of them, with gross or wanton negligence, or in a gross or wantonly negligent manner, drove, ran or operated upon said railway or across said public highway so passing through said Wilson farm, a locomotive or engine or train of cars, or that in so doing the defendants, or either of them, with gross or wanton negligence, struck said Nancy

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Wilson, with said locomotive, engine or cars, upon said public highway passing through said Wilson farm, or any other place. They deny that thereby said Nancy Wilson was so injured that she soon thereafter died thereof. They deny that the defendants, or either of them, at the time or place aforesaid, with gross or wanton negligence, drove, ran or operated said locomotive, engine or cars, upon, over or across said two public highways, or either of them, with great, excessive or dangerous speed, or at the rate of sixty
14 miles or more an hour, or with gross or wanton negligence defendants, or either of them, failed to keep or have upon said locomotive, engine or train, a proper or any look-out for travelers upon said alleged public highways, or either of them, or with gross or wanton negligence the defendants, or either of them, failed to give either from or by said locomotive, engine, train or otherwise, any notice, signal or warning of any kind of the approach of said locomotive, engine or cars to said public highways or crossing, or either of them, or to the said crossing through said Wilson farm, or of the approach thereof to, or running thereof upon the said alleged public highways, or either of them, or crossing, or road through said Wilson farm; or with gross or wanton negligence defendants, or either of them, then or there failed to have at or near said crossing, or either of them, any means to warn travelers upon said public highways or either of them, or said crossings through said Wilson farm, or either or any of them, of the coming of locomotives, engine or cars upon said railway to protect travelers upon said public highways through said Wilson farm, or said other highways, from injury by locomotive engines or cars moving upon said railway; and they deny that they, or either of them, were, at the time or place aforesaid, in many other ways, or in many other respects, grossly or wantonly negligent, or that because of all or any of said negligence, the said Nancy J. Wilson was injured, or her life de-
15 stroyed as aforesaid.

They deny that all or any of said negligence mentioned in the petition was done by or through any of the defendants, or of the defendants, Frank Fisher, James McCleod, —— Fairhead, —— Fox, or —— Snedager, or either of them, and the- deny that the said last named defendants were, at the time or place aforesaid, respectively conductor, engineer or fireman of said locomotive, engine or train, or were then and there the agents or servants of the defendant, the Chesapeake and Ohio Railway Company, or were employed by said corporation as conductor, engineer or fireman, of or upon said locomotive, engine or train. They deny that by the destruction of the life of the said Nancy Jane Wilson, as alleged, her estate was damaged in the sum of $10,000.00, or any other sum.

Wherefore, &c.

Par. 2. The defendants, The Chesapeake and Ohio Railway Co., and Maysville and Big Sandy R. R. Co., for further answer to the petition of plaintiff, state that at the time and on the occasion of the accident and injury, which resulted in the death of the decedent, Nancy J. Wilson, the said decedent was guilty of negligence which contributed to the accident and her injuries and death, and but for

which negligence upon her part, the accident would not have happened and the injuries would not have been received, and the death would not have been occasioned.

16 Wherefore having fully answered, defendants pray that they be hence dismissed, with judgment for their costs herein expended.

At a Circuit Court began and held for Lewis County, at the Court House in Vanceburg, on the 2nd day of September, 1902, the following order was made:

*Order Noting Reply.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & AL., Defendants.

The plaintiffs this day produced their reply herein which is filed. Said reply is as follows:

*Reply.*

Lewis Circuit Court.

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & AL., Defendants.

For reply to the answer of defendants, the plaintiffs deny
17 that at the time or on the occasion of the accident and injury which resulted in the death of their intestate, Nancy J. Wilson, she was guilty of negligence which contributed to the accident or her injuries or death, or that but for her said alleged negligence the accident would not have happened or the injuries would not have been received, or that her death would not have been occasioned.

Wherefore having fully replied plaintiffs pray as in their petition.

At a Circuit Court began and held for Lewis County at the Court House in Vanceburg, on the 3rd day of September, 1902, the following order was made:

*Order Remanding Cause from U. S. Court.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & ALS., Defendants.

It appearing to the court that the above styled cause has been remanded to this court by the U. S. Circuit Court for the Eastern Dis-

trict of Kentucky, on motion of plaintiffs, it is ordered that
18 said cause be and the same is re-docketed for trial, and shall take its regular place on the said docket, to which defendants object and except. This order to be entered *nunc pro tunc.*

At a Circuit Court began and held for Lewis County, at the Court House in Vanceburg, on the 3rd day of September, 1902, the following order was made:

*Order. Leave to Def'ts to Amend Answer on Face.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & ALS., Defendants.

Upon motion of defendants leave is given them to amend their answer herein upon its face, which is done.

At a Circuit Court began and held for Lewis County, at the Court House in Vanceburg, on the 3rd day of September, 1902, the following order was made:

*Order. Leave to Pl'ffs to Amend Pet. on Face.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & ALS., Defendants.

19 Upon motion of plaintiffs, leave is given them to amend their petition herein upon its face, which is done.

At a Circuit Court began and held for Lewis County at the Court House in Vanceburg, on the 8th day of September, 1902, the following order was made:

*Order Substituting Copy of Pet. as Original.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & ALS., Defendants.

By agreement of parties it is ordered that the copy of the original petition filed herein, made and delivered to W. H. Wadsworth, attorney for the defendants, be now filed in this action in room and stead of the original petition which is now lost and can not be found, and said copy of said original petition is now taken and substituted in lieu and stead of the original petition, and shall to all intents and purposes stand in lieu and stead of said original petition which is out of the record of the case.

20 At a Circuit Court began and held for Lewis County at the Court House in Vanceburg, on the 19th day of January, 1903, the following order was made:

*Order Noting Written Motion of Pl'ffs.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. Co. & ALS., Defendants.

The plaintiffs, J. B. Wilson, Adm'r, this day produced his written motion herein which is filed and is as follows:

*Written Motion by Pl't'ffs to Strike Part of Names of Def'ts from Cause.*

Lewis Circuit Court.

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. Co. & ALS., Defendants.

The plaintiffs, J. B. Wilson &c., Adm'rs, move the court to dismiss without prejudice this action as to the defendants, Frank Fisher, James McCloud, —— Fairhead, —— Fox, and —— Snedager, who were at the time of said accident respectively, conductor, engineers and fireman of said locomotive, engine and train, and were then and there agents and servants of their co-defendants, Mays-
21 ville and Big Sandy Railroad Company, and Chesapeake and Ohio Railway Company, and the court having considered of said motion and being sufficiently advised adjudged that said motion be sustained, and that said cause be dismissed as to said parties.

At a Circuit Court began and held for Lewis County, at the Court House in Vanceburg, on the 21st day of January, 1903, the following order was made:

*Order. Motion to Remove Cause to U. S. Court by Def'ts.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. Co. & ALS., Defendants.

The defendants this day produced their petition and bond herein for the removal of this cause to the United States Circuit Court at Covington, and offerred and moved to file the same and that said cause be removed to said U. S. Circuit Court at Covington, Ky., to which the plaintiffs objected, and the court having considered of

same and being sufficiently advised adjudges that said petition and bond be filed and said bond approved, to which the plaintiffs excepted; and that said motion to remove said cause to the
22 United States Circuit Court be overruled, to which the defendant excepted.

Said petition for removal of cause to U. S. Court is as follows:

*Pet. for Removal of Cause to U. S. Court.*

Lewis Circuit Court.

J. B. WILSON and J. W. McDONALD, Administrators of the Estate of Nancy J. Wilson, Deceased, Plaintiffs,

*vs.*

CHESAPEAKE & OHIO RAILWAY CO. & ALS., Defendants.

To the Honorable, the Circuit Court of Lewis County, State of Kentucky:

Your petitioner, the Chesapeake and Ohio Railway Company, respectfully shows that it is one of the defendants in the above entitled suit, and that the matter and amount in dispute in the said suit, exclusive of interest and costs, exceeds the sum or value of $2,000.00. Your petitioner further shows that the said suit is of a civil nature and that there is in said suit a controversy which is wholly between citizens of different states, and which can be fully determined as between them, to-wit: a controversy between your said petitioner, the Chesapeake and Ohio Railway Company, who avers that it was, at the time of the bringing of this suit, and still is, a corporation
23 created, organized and existing under and by virtue of the laws of the State of Virginia, and a citizen of said State of Virginia, and the said plaintiffs, J. B. Wilson and J. W. McDonald, Administrators of the estate of Nancy J. Wilson, deceased, who, your petitioner avers, were then and still are, citizens of the State of Kentucky.

Your petitioner further shows that the said controversy is of a civil nature, viz: whether your petitioner is liable to the said plaintiffs for damages on account of the death of their intestate, Nancy J. Wilson, alleged to have been caused by certain alleged negligence of petitioner and its co-defendant herein, in operating a train of petitioner over the line of railroad of the defendant, Maysville and Big Sandy Railroad Company, leased to petitioner, by running the said train over plaintiffs' intestate, Nancy J. Wilson, whereby she was instantly killed, and that on account of such alleged negligence, your petitioner has damaged the estate of said intestate in the sum of ten thousand ($10,000.) dollars.

Your petitioner further states and shows that this suit was originally brought in the Lewis Circuit Court, on March 23rd, 1900, against your petitioner, and the Maysville and Big Sandy R. R. Co., Frank Fisher, and James McCleod, conductors, and —— Fairhead, and —— Fox, Engineer and Fireman, as defendants therein, and

afterwards your petitioner filed its petition and bond for re-
24 moval of said original suit to the Circuit Court of the United States, for the District of Kentucky, and an order of removal was entered in this court, and the transcript was duly filed in said Circuit Court of the United States, and therein the cause was thereafterwards duly docketed, and the plaintiffs filed their motion to remand the same; and afterwards, the said Circuit Court of the United States being duly advised, sustained the said motion, and by an opinion and order entered on the 14th day of July, 1902, the said cause was remanded to the Lewis Circuit Court, which opinion held that the joinder by plaintiffs, of the individual employé defendants in said original suit, had the effect to prevent your petitioner from removing the same to the said Circuit Court of the United States; and afterwards, at the September term, 1902, of the said Circuit Court, this case was re-docketed, and afterwards, and at and during said September term, the defendants, your petitioner and the Maysville and Big Sandy Railroad Company, filed their answer herein and the cause was continued.

Your petitioner further states and shows that at the present January term, 1903, of this court, to-wit: on January 19, 1903, and in the afternoon of said date, and just a few minutes before the adjourning hour, the plaintiffs entered an order in the Lewis Circuit Court discontinuing this action against all of said individual defendants, and the suit is now proceeding in said Court against
25 your petitioner, and its co-defendant, the Maysville and Big Sandy Railroad Company alone; and now on this 21st day of January, 1903, and as soon as your petitioner could possibly prepare and execute petition and bond for removal of this cause after said order of discontinuance was made, your petition- comes and states and shows that the said controversy is as hereinbefore recited, and that the petition states no cause of action against its co-defendant, the Maysville and Big Sandy Railroad Company, and that said co-defendant is not a necessary or proper party defendant to this action, which may be determined as between the plaintiffs and your petitioner without reference to, or any connection with, the said co-defendant.

Your petitioner further states and shows that at the time of making of the lease and the contract referred to in the petition said Maysville and Big Sandy Railroad Company had ample authority of law to make said lease and contract, and same were made under and in pursuance thereof, and the said Chesapeake and Ohio Railroad Company had ample authority of law to take and receive the said lease and contract; and it states and shows that your petitioner at the time of the injury complained of, and before and since, has been in possession, and was then in possession, under said contract, of all of said Maysville and Big Sandy Railroad Company's roadbed, tracks, depots and all other railroad property in Kentucky,
26 and was in entire control and occupation of the same, and was operating same at said time, and before and since, entirely on its own account and in its own name.

Your petitioner states further that at the time of the bringing of

this action and the injury complained of, it was, and is now, entirely solvent; and it states that its co-defendant, the Maysville and Big Sandy Railroad Company, was at said times, and is now, insolvent, all of which the plaintiffs well knew at the time of the bringing of this suit, and at the time of the discontinuance of this suit, as to the co-defendant, as hereinbefore set out; and your petitioner charges and avers that the said co-defendant was joined in this action with your petitioner for the sole purpose of unlawfully, wrongfully and fraudulently preventing a removal of this case, by your petitioner, to the Circuit Court of the United States.

And your petitioner offers herewith a bond, with good and sufficient surety, for its entering in said Circuit Court of the United States, for the Eastern District of Kentucky, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by said Circuit Court, if said Court shall hold that this suit was wrongfully or improperly removed thereto, and it prays that this Honorable Court *to* proceed no further herein except to make the order of removal required by law, and to accept
27 said surety and bond, to cause the record herein to be removed into said Circuit Court of the United States for the Eastern District of Kentucky, and it will ever pray.

STATE OF KENTUCKY, *County of Boyd:*

I, W. H. Wadsworth, being duly sworn, do say that I am the attorney for the petitioner in the above entitled cause; and that I have read the foregoing petition and know the contents thereof; that the statements and allegations therein contained are true as I verily believe.

W. H. WADSWORTH.

Subscribed by the said W. H. Wadsworth, in my presence and by him sworn to before me this 21st day of January, A. D., 1903.

W. D. COCHRAN,
*Notary Public.*

My commission expires Mch. 3rd, 1906.

*Bond for Removal of Cause.*

Bond of Petitioner.

Lewis Circuit Court.

J. B. WILSON and J. W. MCDONALD, Administrators of the Estate of Nancy J. Wilson, Deceased, Plaintiffs,
*vs.*
CHESAPEAKE AND OHIO RAILWAY CO. & AL., Defendants.

28 Know all men by these presents that we, The Chesapeake and Ohio Railway Company, as principal, and W. H. Wadsworth and J. G. Wodsworth, as sureties, are hereby held and firmly

bound unto J. B. Wilson and J. W. McDonald, Administrators of the estate of Nancy J. Wilson, deceased, in the penal sum of one thousand dollars; for the payment thereof, well and truly to be made unto the said J. B. Wilson and J. W. McDonald, Administrators of the estate of Nancy J. Wilson, deceased, their heirs and assigns, we bind ourselves, jointly and severally, firmly by these presents:

Yet upon these conditions: the said Chesapeake and Ohio Railway Company, having petitioned the Circuit Court of Lewis County, State of Kentucky, for the removal of a certain cause therein pending, wherein J. B. Wilson and J. W. McDonald, Administrators of the estate of Nancy J. Wilson, deceased, are plaintiffs and The Chesapeake and Ohio Railway Company is defendant, to the Circuit Court of the United States in and for the Eastern District of Kentucky:

Now, if the said Chesapeake and Ohio Railway Company, your petitioner, shall enter in the said Circuit Court of the United States, in and for the Eastern District of Kentucky, on the first day of its next session, a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said Circuit Court
29 of the United States, in and for the Eastern District of Kentucky, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise in full force and virtue.

Witness our hands and seals this 21st day of January, A. D., 1903.

CHESAPEAKE AND OHIO RAILWAY COMPANY, [SEAL.]
By W. H. WADSWORTH, *Attorney.*
W. H. WADSWORTH. [SEAL.]
J. G. WADSWORTH. [SEAL.]

STATE OF KENTUCKY, *Mason County:*

We, W. H. Wadsworth, and J. G. Wadsworth, both of Mason County, in said State, the sureties in the foregoing bond, being duly sworn, do depose and say, each for himself, that we are residents of the State of Kentucky, and property holders therein, and that we are each of us worth the sum of one thousand dollars, over and above all our debts and liabilities and exclusive of property by law exempt from execution, and that each have property in the State of Kentucky liable to execution and of the value of more than one thousand dollars.

W. H. WADSWORTH.
J. G. WADSWORTH.

Subscribed in my presence by W. H. Wadsworth and J. G. Wadsworth, and by them sworn to before me this 21st day of January, A. D., 1903, and I further certify that my commission as Notary Public expires on the 3rd day of M'ch, 1903.

W. D. COCHRAN,
*Notary Public.*

30 At a Circuit Court begun and held for Lewis County at the Court House in Vanceburg, on the 21st day of January, 1903, the following order was made:

*Order Noting Amended Answer.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & AL., Defendants.

The defendants this day produced their amended answer herein and offered and moved to file the same to which the plaintiffs objected, and the court having considered of same and being sufficiently advised adjudges that said motion be sustained and that said amended answer be now filed, to which the plaintiffs excepted.

Said amended answer is as follows:

*Amended Answer.*

Lewis Circuit Court.

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & AL., Defendants.

Def'ts amend their answer herein and deny that it was
31 negligence in them to fail to have at or near the crossings or either of them mentioned in plaintiff's petition, a watchman or gate or other device or apparatus or means to warn travelers upon said alleged public highways and said crossings, through said Wilson farm of the approach of locomotives or engines or cars thereto.

At a Circuit Court begun and held for LEWIS County at the Court House in Vanceburg, on the 21st day of January, 1903, the following order was made:

*Order Noting Amended Petition.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & ALS., Defendants.

Pending defendants' motion to file their amended answer, the plaintiffs this day produced their amended petition herein and offered and moved to file the same, to which the defendants objected, and the court having considered of same and being sufficiently advised adjudges that said amended petition be now filed, to which the defendants excepted.

At a Circuit Court begun and held for Lewis County at the Court House in Vanceburg, on the 21st day of January, 1903, the following order was made:

32 *Order Setting Aside Order Filing Amended Petition.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & AL., Defendants.

Upon motion of defendants it is ordered that the order made herein permitting plaintiffs to file their amended petition herein this day, be now set aside, and the motion to file same is now overruled, to which the plaintiffs objected and excepted.

At a Circuit Court begun and held for Lewis County at the Court House in Vanceburg, on the 21st day of January, 1903, the following order was made:

*Order. Continuance.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & ALS., Defendants.

The defendants this day produced the affidavit of W. H. Wadsworth and A. H. Parker, herein which are filed, and thereupon moved the court that this cause be continued, to which the plaintiffs objected, and the court having considered of same and being sufficiently advised, adjudges that said cause be continued.

33 At a Circuit Court begun and held for Lewis County at the Court House in Vanceburg, in the 22nd day of January, 1903, the following order was made:

*Order Setting Aside Continuance.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & ALS., Defendants.

On motion of plaintiffs it is ordered that the order of continuance made herein on the third day of the present term of this court be now set aside.

At a Circuit Court began and held for Lewis County, at the Court House in Vanceburg, on the 22nd day of January, 1903, the following order was made:

*Order Making Amended Petition Part of Record.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & ALS., Defendants.

Upon motion of plaintiffs it is ordered that the amended petition of plaintiffs offered to be filed herein on the third day of the
34 present term of this court be and the same is now made a part of the record of this action.

Said amended petition is as follows:

*Amended Pet.*

Lewis Circuit Court.

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & ALS., Defendants.

The plaintiffs come and by leave of court amend their petition herein and for amendment state that their intestate was the fee simple owner of the farm through which defendant Railroad and Railway Company ran; that the right of way obtained from her by condemnation proceedings, ran through and between her home on the one side and the home of her son on the other side; that the only way to get from one place to the other was by crossing the right of way of defendants on her own farm; that where she was so crossing at or near a crossing on said farm as aforesaid, she was injured and killed as aforesaid.

Wherefore they pray as in their original petition and for all proper relief.

At a rule day on the 1st day of June, 1903, the following order was made, of the records of the Lewis Circuit Court:

35 *Order Noting Amended Pet.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & ALS., Defendants.

The plaintiffs this day produced their amended petition herein which is filed.

At a Circuit Court began and held for Lewis County at the Court House in Vanceburg, on the 9th day of September, 1903, the following order was made:

*Motion to File Amended Pet., &c., &c.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & AL., Defendants.

The plaintiffs presented and offered to file their amended petition herein to which defendants objected, and pending said motion the defendant- moved to strike from the files the amended petition marked "Filed June 1, 1903," which had been filed out of term time, on a rule day, and without leave of court, the Court sustained said motion, and ordered same stricken from the files, to which ruling the plaintiffs objected and excepted.

Plaintiffs then offered to file in open court the amended
36 petition so stricken from the files, to which defendants objected, and the court sustained said objection, to which the plaintiffs objected and excepted.

The Court then suggested to counsel for plaintiffs that they withdraw both amendments offered and present a single amended petition.

Plaintiffs then presented again the amended petition filed at rule day, having written therein the amended petition offered at motion hour, the same was then offered, endorsed, "Filed June 1st, 1903," to the filing of which defendants objected and the court sustained said objection, and refused to permit the same to be filed, to which the plaintiffs objected and excepted.

On motion of plaintiffs ordered that the amended petition stricken from the files be now made part of the records herein for the purpose of appeal.

Said amended petition filed on rule day, June 1st, 1903, is as follows:

*Amended Pet., Filed June 1st, 1903.*

Lewis Circuit Court.

J. B. WILSON & ALS., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & AL., Defendants.

The plaintiffs, J. W. McDonald and J. B. Wilson, as ad-
37 ministrators of Nancy Wilson, deceased, by leave of court amend their petition and for amendment state, that the highway upon which their intestate was traveling, was a highway and public only in the sense that much people traveled over and along it and had been doing so for a long time prior to her death. That the crossing at which their intestate was killed was a private crossing situated not far from the public crossing for which defendants were accustomed to give signals, but for which on the occasion of her death, they gave none. That said private crossing is and was at all times herein mentioned maintained by defendants for the benefit of

the owner of the land containing same in part consideration of the grant of a right of way through said land. That said private crossing is and was at all times herein mentioned at a point where the view of the track is obstructed by a large pile or bank of dirt which defendants, their agents and servants, carelessly and negligently allowed to be placed and remain thereat. That although the track is level for a long distance on either side of said crossing beyond said obstruction, yet since said obstruction to the view of said track at said point has existed it has been the custom of defendants, their agents and servants, to give the usual signals or warnings of the approach of trains thereto, but which signals *are* warnings defendants, their agents and servants, carelessly and negligently
38 failed to give at the time or on the occasion of the death of their intestate.

Wherefore, plaintiffs pray judgment as in their petition and for all proper relief.

At a Circuit Court begun and held for Lewis County at the Court House in Vanceburg, on the 9th day of September, 1903, the following order was made:

*Order Noting Amended Pet.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & AL., Defendants.

Plaintiffs this day offered to file their amended petition herein, to which defendants objected, and the court overruled said objections and ordered said amended petition filed, to which defendants excepted.

Said amended petition is as follows:

*Amended Pet.*

Lewis Circuit Court.

J. B. WILSON & ALS., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & AL., Defendants.

The plaintiffs, J. W. McDonald and J. B. Wilson, as ad-
39 ministrators of Nancy Wilson, deceased, by leave of court amend their petition, and for amendment state, that the highway upon which their intestate was traveling, was a highway and public only in this sense, that much people traveled over and along it and had been doing so for a long time prior to her death. That the crossing at which their intestate was killed was private crossing situated about one thousand feet from the public crossing for which defendants were accustomed to give signals, but for which on the

occasion of her death, they gave none. That their intestate was killed at said private crossing while using and exercising an easement or way of necessity from her land on one side of said track to her house on her land on the other side of said track. That signals at or for said public crossing could be heard by and were also relied on by persons using said private crossing. That signals were accustomed to be given by defendants, their agents and servants at and for said public crossing also; but on the occasion of the death of their intestate, no signal or warning was given at said public crossing, or at all That said private crossing is and was at all times herein ment. ed maintained by defendants for the benefit of the owner of the land containing same in part consideration of the grant of a right of way through said land. That said private crossing is and was at all times herein mentioned at a point where the view
40 of the track is obstructed by a large pile of bank of dirt which defendants, their servants and agents, carelessly and negligently allowed to be placed and remain thereat, and which rendered said crossing specially hazardous. That although the track is level and unobstructed for a long distance, to-wit: about one half mile on either side of said crossing beyond said obstruction, yet since said obstruction to the view of said track at said point has existed it has been the custom of the defendants, their agents and servants, also to give the usual signals or warnings of the approach of trains thereto, but which signals or warnings defendants, their agents and servants, carelessly and negligently failed to give at the time or on the occasion of the death of their intestate.

Wherefore plaintiffs pray judgment as in their petition and for all proper relief.

At a Circuit Court begun and held for Lewis County at the Court House in Vanceburg, on the 20th day of January, 1904, the following order was made:

*Order Noting Written Motion.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & AL., Defendants.

41 The defendants this day produced their written motion herein, which is filed and is as follows:

The defendant comes and moves the court to require the plaintiffs to elect which of the inconsistent statements in the original and amended pleadings herein shall be stricken therefrom, to-wit: the allegations in the original petition that the place where plaintiff's intestate was stricken and killed was upon a public highway, or the allegations of the amended petition that same was a private crossing, and the Court having considered of same and being sufficiently advised adjudges that said motion be sustained, to the filing of said motion the plaintiffs object and to the ruling of the court thereon the plaintiffs except.

Thereupon the plaintiffs elected to have stricken out the allegations of the original petition that the place where decedent was killed was upon a public highway.

At a Circuit Court began and held for Lewis County at the Court House in Vanceburg, on the 20th day of January, 1904, the following order was made:

*Order Noting Written Motion of Def'ts.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & AL., Defendants.

42 The defendants this day produced its written motion herein, which is filed and is as follows:

The defendants move the court to strike from the original petition the following language, to-wit: all that certain language beginning with the words "at the," in the 23rd line after 2nd page thereof, and ending with the words, "State of Kentucky" in the 18th line after 4th page thereof, and each and all language embraced in and between said beginning and ending and each and every part thereof.

Also all the language in the amended petition filed September 9th, 1903, beginning with the words "that," in the 3rd line after 1st page thereof, and ending with the words "her death," in the 7th line of the said page, and all language in and between said beginning and ending, and each and every part thereof, and the Court having considered of same and being sufficiently advised adjudges that said motion be sustained and that said parts be stricken out, to which the plaintiffs except.

At a Circuit Court begun and held for Lewis County at the Court House in Vanceburg, on the 20th day of January, 1904, the following order was made:

*Order Noting Amended Pet.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & AL., Defendants.

43 The plaintiffs this day produced their amended petition herein and offered and moved to file the same, to which defendants objected, and the court having considered of same and being sufficiently advised adjudges that said amended petition be now filed, to which the defendant excepted.

Said amended petition is as follows:

*Amended Pet.*

Lewis Circuit Court.

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & AL., Defendants.

The plaintiffs by leave of court amend their petition and state that on September 2nd, 1899, Nancy J. Wilson was a traveler upon said passway upon and across said Wilson farm to her home on said farm, and in so doing of necessity had to cross defendants' track, and while she was so traveling upon said passway where same crosses said railway, for the purpose of crossing or passing over same, the defendants then and there with gross and wanton negligence and in a gross and wantonly negligent manner drove, ran and operated upon said railway and across said passway through said farm, a locomotive and engine and train of cars, and they, in so doing, with gross
44 and wanton negligence struck said Nancy Wilson, with said locomotive, engine and cars upon said passway through said farm and thereby said Nancy Wilson was so injured that she soon thereafter died thereof. That the defendants were at the time and place aforesaid and in many other ways and in many other respects grossly and wantonly negligent and because of all of said acts of negligence said Nancy J. Wilson was injured and her life destroyed as aforesaid to the damage of her estate in the sum of $10,000.00.

Wherefore plaintiffs pray as in their petition and for all proper relief.

At a Circuit Court began and held for Lewis County at the Court House in Vanceburg, on the 20th day of January, 1904, the following order was made:

*Order Noting Demurrer to Amended Pet.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. Co., &c., Defendants.

The defendant, C. & O. Ry. C-., this day produced its demurrer to the amended petition herein which is filed, and the court having considered of same and being sufficiently advised adjudges that said demurrer be overruled, to which the defendants excepted.
45 Said demurrer is as follows:

*Demur- to Amended Pet.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO., — Defendants.

The defendant demurs to the plaintiff's petition as amended, because the same does not state facts sufficient to constitute or support a cause of action against it.

At a Circuit Court began and held for Lewis County at the Court House in Vanceburg, on the 21st day of January, 1904, the following order was made:

*Order Noting Amended Answer.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO., — Defendants.

The defendants this day produced their amended answer herein which is filed.
Said amended answer is as follows:

46 *Amended Answer.*

Lewis Circuit Court.

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & AL., Defendants.

The defendants come and for amended answer and for answer to the amended petitions herein, withdraw so much of the original and amended answer as is responsive to the allegations of the original petition as have been, by the order of this court, stricken out, and deny that the private crossing, at which plaintiffs' decedent was killed, was situated about one thousand feet from the public crossing for which defendants were accustomed to give signals, and aver that it was one mile from any such public crossing. They deny that on the occasion of the death of the decedent they gave no signal at said public crossing. They deny that plaintiffs' intestate was killed while using or exercising an easement or way of necessity from her land on one side of the said track to her house on her land on the other side of said track. They deny that on September 2rd, 1899, while Nancy J. Wilson was crossing defendants' track on said passway, defendants, or either of them, then or there with gross or wanton negligence or in a gross or wantonly negligent manner,
drove, ran or operated upon said railway or across said pass-
47 way through said farm, a locomotive or engine or train of cars, or that they or either of them, in so doing, with gross

or wanton negligence, struck said Nancy J. Wilson with said locomotive, engine or cars upon said passway through said farm, or that thereby said Nancy J. Wilson, was injured so that she died thereof. They deny that the striking of said decedent was done or caused by the gross or wanton, or by any, negligence of these defendants, or either of them. They deny that they, or either of them, were at the said time or place, in many other ways or in many other respects, or in any other respect or ways, grossly or wantonly, or at all, negligent, or that because of all or any of such acts of negligence, decedent was injured or her life destroyed, or that her estate was damaged in the sum of $10,000.00, or any sum. They deny that signals at or for said public crossing could be heard by, or were relied on by, persons using such private crossing.

They deny that the signals which were accustomed to be given by defendants, or either of them, or their agents or servants at and for said public crossing, were not given on the occasion of the death of the decedent or that no signals or warning was given at said public crossing on said occasion or at all. They deny that said private crossing is or was, at all, or any times, maintained by defendants, or either of them, for the benefit of the owner of the land con-
48 taining same, or was in part or any, of the consideration for the grant of the right of way through said land. They deny that said private crossing is or was, at all or any times, at a point where the view of the track is obstructed by a large pile or bank of dirt, or which defendants, or either of them, or their agents or servants, carelessly or negligently allowed to be placed or remain thereat, or which rendered said crossing especially hazardous. They deny that it was especially hazardous. They deny that any obstruction to the view has ever existed. They deny that it has been the custom of defendants, or either of them, or their agents or servants, to give the usual or any, signals or warnings of the approach of trains thereto. They deny that they or either of them, or their agents or servants, carelessly or negligently failed to give signals or warnings of the approach of the train at the time or on the occasion of the death of decedent. Wherefore, &c.

Par. 2. The defendants further answering state that upon the occasion of the injury and death complained of, the decedent, Nancy J. Wilson, was herself guilty of negligence which contributed to her injury and death, and but for which negligence on her part, the injuries would not have been received and the death would not have resulted.

Wherefore having fully answered defendants pray that they be hence dismissed, with judgment for costs herein expended.

49 At a Circuit Court begun and held for Lewis County at the Court House in Vanceburg, on the 18th day of May, 1904, the following order was made:

*Allegations of All Pleadings Traversed of Record.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & AL., Defendants.

By agreement of parties it is ordered that all affirmative allegations in plaintiffs' pleading be now traversed of record.
By agreement of parties it is ordered that all affirmative allegations in the defendants' pleadings be now traversed of record.

At a Circuit Court begun and held for Lewis County at the Court House in Vanceburg, on the 18th day of May, 1904, the following order was made:

*Order. Submission.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & AL., Defendants.

50 The parties appeared by their attorneys, thereupon came a jury, to-wit: John Lykins, G. W. Dale, Ab. Large, W. H. Torrence, James Carver, Chas. A. Cox, Wm. Gose, Obed McNutt, Samuel Hull, James L. Chadwick, M. A. Armstrong, James Anderson, who were duly sworn to try the issue and having heard the evidence in part and being unable to complete the trial were cautioned by the Court and adjourned until 8½ o'clock to-morrow morning.

At a Circuit Court begun and held for Lewis County at the Court House in Vanceburg, on the 19th day of May, 1904, the following order was made:

*Judgment.*

J. B. WILSON & ALS., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & AL., Defendants.

The jury sworn herein on yesterday this day reappeared in their seats, and having heard the evidence on behalf of the plaintiffs, the defendants moved the court to instruct the jury to find for the defendants, to which plaintiffs objected, and the court having considered of same and being sufficiently advised, adjudges that said motion be sustained, and instructed the jury to find for the
51 defendants—thereupon the jury returned the following verdict,

"We, the jury, find a verdict for the defendants."

JOHN W. LYKINS, *Foreman.*

It is therefore adjudged that plaintiffs' petition be dismissed, and that the defendants recover of them their costs herein duly expended, to all of which plaintiffs object and except.

At a Circuit Court begun and held for Lewis County at the Court House in Vanceburg, on the 19th day of May, 1904, the following order was made:

*Order Noting Grounds for New Trial.*

J. B. WILSON & ALS., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & AL., Defendants.

The plaintiffs this day produced their motion and grounds for a new trial herein which are filed, and thereupon moved the court for a new trial of this cause, and the court not being sufficiently advised took time.

52 At a Circuit Court begun and held for Lewis County at the Court House in Vanceburg, on the 23rd day of May, 1904, the following order was made:

*Order Calling Up Motion for New Trial.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & AL., Defendants.

The plaintiffs this day called their motion and grounds for a new trial of this cause, and the court having considered of same and being sufficiently advised, adjudges that said motion be overruled, to which the plaintiffs excepted.

At a Circuit Court begun and held for Lewis County at the Court House in Vanceburg, on the 23rd day of May, 1904, the following order was made:

*Order. Time to File Bill of Excepts.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & ALS., Defendants.

53 Upon motion of plaintiffs time is given them to and including the third day of the next term of this court to file their bill of exceptions herein.

At a Circuit Court begun and held for Lewis County at the Court House in Vanceburg, on the 23rd day of May, 1904, the following order was made:

*Order Noting Bill of Excepts.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO. & AL., Defendants.

The plaintiffs this day produced and tendered to the court their Bill of Exceptions herein and leave was given the defendants to examine same before the filing thereof.

At a Circuit Court begun and held for Lewis County at the Court House in Vanceburg, on the 6th day of September, 1904, the following order was made:

*Order Noting Bill of Excepts.*

J. B. WILSON & AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. Co. & AL., Defendants.

54 The plaintiffs this day produced to the court their bill of exceptions herein, duly signed and sealed by the court, which is filed, and ordered to be made a part of the record which is accordingly done.

The plaintiffs pray an appeal to the Court of Appeals, which is granted.

The following is Avowal No. 1, by plaintiff- on the trial of the cause:

*Avowal No.* 1 *by Pl'ffs.*

J. B. WILSON & ALS., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. Co. & ALS., Defendants.

The plaintiffs, J. B. Wilson and J. W. McDonald, aver that if allowed they will prove by the witness, J. B. Wilson, that he was agent for his father Mason Wilson, in the negotiations for the right of way through said farm of Mason Wilson, and in regard to keeping and maintaining the crossing at which their intestate was killed; that the original has been either lost or misplaced; that in said contract it was agreed between the Maysville and Big Sandy R. R. Co., defendant, and said Mason Wilson, that said R. R. Co. should keep and maintain said crossing in good condition as a part considera-
55 tion for the right of way through said farm; that pursuant to said contract said R. R. Co. made said crossing and has exercised control over it ever since then; that in the trial of this cause defendants were called on to produce the original, but they produced what purported to be a type-written copy, aged in appearance and which shows on its face that it was never acknowledged.

*Grounds and Motion for New Trial.*

Lewis Circuit Court.

J. B. WILSON & AL., Plaintiffs,
*vs.*
C. & O. RY. CO. & AL., Defendants.

Grounds for New Trial.

The plaintiffs, J. B. Wilson and J. W. McDonald, as administrators of Nancy J. Wilson, deceased, move the court to set aside the verdict and judgment entered herein and grant them a new trial upon the following grounds, to-wit:

1st. The Court erred to the prejudice of the plaintiffs in refusing to admit competent evidence offered by them, to which ruling plaintiffs at the time excepted and still excepts.

2nd. The Court erred to the prejudice of plaintiffs in refusing to admit the testimony contained in the avowal No. 1, also
56–128 the avowal as to the testimony of J. B. Wilson, relative to contents of the contract in regard to private crossing on the land of their intestate, to which ruling plaintiffs at the time excepted and still except.

3rd. The court erred to the prejudice of plaintiffs in peremptorily instructing the jury to find for the defendants, to which ruling plaintiffs at the time excepted and still except.

Wherefore, &c.

* * * * * * *

129 And with said transcript of the record the appellant- filed a statement, and which is as follows:

130 *Statement.*

Kentucky Court of Appeals.

NANCY WILSON'S ADM'RS, Appellants,
*vs.*
CHESAPEAKE & OHIO RY. Co., &c., Appellees.

(1.)

J. B. Wilson and J. W. McDonald as administrators of Nancy Wilson, deceased, are appellants.

(2.)

The Chesapeake & Ohio Ry. C. and the Maysville & Big Sandy R. R. Co. are appellees.

(3.)

The judgment appealed from was rendered by the Lewis Circuit Court at its May term, 1904, and may be found on page — of the record.

(4.)

No summons is desired because an appeal was granted by the lower court.

ALLEN D. COLE,
*Att'y for Appellants.*

131 Be it remembered that on the 10th day of February 1905 at a Court of Appeals held at the Capitol at Frankfort the following order was entered—

WILSON'S ADM'R
*v.*
C. & O. RY. CO., ETC.

Lewis.

This case is ordered to be submitted.

Be it remembered that on the 25th day of April, 1905, at a Court of Appeals held at the Capitol at Frankfort on the 25th day of April 1905 the following judgment was entered to-wit:

NANCY WILSON'S ADM'R, Appellant,
*vs.*
CHESAPEAKE & OHIO RAILWAY CO., ETC., Appellee.

Appeal from the Lewis Circuit Court.

The Court being sufficiently advised it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed, and cause remanded for further proceedings consistent with the opinion herein which is ordered certified to said Court.

It is further considered that the appellant recover of appellee his costs herein expended.

132 And on said date the following opinion was delivered:

133 Court of Appeals of Kentucky, Apr. 25, 1905.

NANCY WILSON'S ADM'RS, Appellants,
*vs.*
CHESAPEAKE & OHIO RY. CO., ETC., Appellees.

Appeal from Lewis Circuit Court.

Opinion of the Court by Judge NUNN:

On the 2nd of September 1899 one Nancy J. Wilson was killed by one of appellees' trains. Her administrators brought this action for the recovery of damages therefor. On the trial and after appellants had introduced their evidence, on motion of appellees, the

court granted them a peremptory instruction and the jury rendered a verdict in conformity therewith. Of this the appellants complain.

The only question to be determined is, whether the appellants introduced any evidence to authorize a recovery. If so there
134 must be a reversal, otherwise an affirmance.

It is shown in the record that Mason Wilson, the husband of Nancy, owned a tract of land in the Ohio river bottom in Lewis county long prior to the building of appellee railroad. That his dwelling was left between the railroad and the river. That he had a passway from his house out from the river for a long time prior to the building of the road and when the railroad was built over this private passway it made a crossing at that point and had kept it in repair ever since and it has been constantly used as a passway. Mason Wilson died many years ago and left his widow residing at the old home. One of her sons, J. B. Wilson, lived on the other side of the railroad from her about a quarter of a mile distant and about 150 yards from the railroad. On the day she was killed she visited her son and started to return to her home about two o'clock P. M., about the time one of appellees' trains was due. She was walking and was holding with one hand her apron containing some cantaloupes and with the other hand an umbrella and she had on a sunbonnet. Before she reached the railroad track and while on this traveled road she had to pass by an embankment of earth
135 which had — placed there by appellees and which was situated between her and the approaching train. When she reached the first rail she was struck by the engine and thrown about forty-five feet and instantly killed.

There was an effort on the part of appellees to show by the proof that this embankment of earth was not of sufficient height to have prevented her from discovering the approaching train if she had been exercising, at the time, any care. The appellants endeavored to show by the proof that this embankment was so high with the weeds growing upon the top of it that it prevented her from seeing the approaching train. There was evidence that tended to sustain each of their contentions.

Appellants proved by many witnesses that there was a public highway crossing the railroad about three-quarters of a mile below this private crossing and that this train which killed Mrs. Wilson was traveling at not less than fifty miles per hour and that it did not whistle at this public crossing nor at the private crossing, until about the moment it struck her. It was also proven that trains occasionally whistled at this private crossing and that those living on the Wilson farm and using this private crossing were
136 governed in using this crossing by the whistle at the public crossing.

There was only one witness introduced who saw her killed and he stated that he did not notice whether or not she turned her head up or down the track as though looking for the train, and upon this statement the appellees contend that she did not exercise any care in approaching the track and that she was guilty of contribu-

tory neglect but for which she would not have been killed and that the peremptory instruction was proper.

It was proven without contradiction that appellees' agents in charge of the train failed to give warning by blowing the whistle or ringing the bell of its approach to the public crossing and that persons using this private crossing were enabled by such signals to avoid collision with the trains. This court in several cases has decided that failure of those in charge of a railroad train to give the signals mentioned to apprise persons at or near a public crossing of its approach must be regarded as negligence. Paducah etc. R. Co. *vs.* Hoehl, 12 Bush, 41, Louisville etc. *vs.* Goetz, 79 Ky., 444 and Cahill *vs.* Cincinnati etc. R. R. Co., 92 Ky. 345. It has
137 been held that the same reason does not exist for giving signals and slackening usual speed of a train at private crossing, and failure in that respect is not generally regarded as negligence. Johnson *vs.* L. & N. R. R. Co., 91 Ky. 651, and the case in 92 Ky. *supra.*

In the Cahill case the court used this language: "But the evidence in this case shows that a signal when given by steam whistle on approach of a railroad train from the South to the public crossing referred to can be distinctly heard at and even beyond Cahill's crossing. And thus arises a question, not heretofore presented to or decided by this court, whether persons lawfully using a private crossing in the vicinity of a public crossing are entitled to the benefit of signals required to be given at the latter; and whether for the failure to give it, negligence, as to them, should in any case be imputed to the railroad company." The court decided that such failure was negligence as to persons using such private crossings. This principle is peculiarly applicable to the case at bar. The court in the Cahill case also used this language; "On the contrary, it is bound to look out for presence of persons at an established
138 and recognized private crossing, and use reasonable precaution and vigilance to avoid injuring them. And so they had the right to act upon the presumption the company will duly comply with every legal requirement that may affect them in the reasonable use of such crossing. Therefore if a person of common prudence and intelligence, who distinctly and habitually hears signals of approach of railroad trains to a public crossing that he knows it is both the duty and custom of the company to give, would ordinarily rely on such signals in the use of his own private crossing, then he would in law as well as in fact have the benefit of them. Otherwise his would be the case of a person injured while in the reasonable exercise of a legal right, yet without remedy against the wrong-doer or person in fault." The court continuing said: "It is not contended the plaintiff was negligent in any respect except failing to look for the coming train before going upon the railroad. Whether either she or Henry Conrad did so look could not, for the reason before indicated, be shown by direct testimony. Therefore it was the peculiar province of the jury, not of the court, to determine that question from facts and circumstances proved; for whatever may be the rule elsewhere it has been definitely settled by this court that it is not

to be presumed in the absence of evidence as to the care exer-
139 cised by a person injured or killed on a railroad, where he had a right to be, that he recklessly or carelessly imperiled his own life. Louisville etc. R. Co. *vs.* Goetz, 79 Ky., 442. Moreover even if plaintiff was guilty of negligence, considering the long distance, four hundred yards, the buggy could have been seen from the train, the question was pertinent and ought to have been submitted to the jury whether those in charge did or could by reasonable diligence have discovered the danger of a collision in time to prevent it by checking the train or blowing the whistle.

But to decide that failure of a person to look along a railroad before attempting to cross it is under all circumstances, and necessarily, negligence, would be arbitrary and without reason; for there may be evidence sufficient to satisfy a person of ordinary carefulness, the track is clear without taking that precaution—as when he knows it is not usual train time and does not hear the signal he knows it is customary for the company to give and him to hear. A person thus reasoning and acting, it seems to us, can not upon principle be regarded as negligent, even if he does fall short
140 of the measure of vigilance needed to prevent being injured by a passenger train running hours behind time, at an extraordinary rate of speed and without any signal of its approach."

These principles are applicable to the case at bar except it was not shown that the train was not behind time or whether the deceased knew the time of the train. But if she did the other facts proven would authorize a submission of the question of her negligence or want of care to the jury for its determination.

In the 12 Bush case *supra* Mary Hoehl, the person injured, stated in her evidence that she did not look up or down the track for an approaching train before going upon the track. There was some evidence that those in charge of the train did not give any signals of the approach to the crossing and the court determined in such case that it was a question of fact to be tried by a jury as to whether or not she was guilty of such negligence as to preclude a recovery on her part.

We are of the opinion that the lower court erred in giving the peremptory instruction.

Wherefore the judgment is reversed and the cause re-
141 manded for further proceedings consistent herewith.

A. D. Cole, T. R. Phister, for appellants.
Worthington & Cochran, W. H. Wadsworth, for appellees.

142–152 Be it remembered that on the 25th day of May 1905 at a Court of Appeals held at the Capitol at Frankfort, the following order was entered to wit:

WILSON'S ADM'R
*v.*
C. & O. RY. CO., ETC.

Lewis.

Came the appellee by counsel and filed a petition and moved the Court to grant a rehearing, which motion is submitted.

The petition named in the foregoing order is in words and figures as follows:

* * * * * * *

153 And afterwards on the 9th day of June 1905, at a Court of Appeals held at the Capitol at Frankfort the following order was entered:

WILSON'S ADM'R
*v.*
*Wilson's Adm'r.*

Lewis.

The Court being sufficiently advised, it is considered that the motion and petition of appellee for a rehearing be and the same is hereby overruled.

1 THE COMMONWEALTH OF KENTUCKY:

Pleas before the Honorable the Court of Appeals, at the Capitol, at Frankfort, on the 5th Day of June, A. D. 1907.

CHESAPEAKE & OHIO RAILWAY CO., ETC., Appellants,
*vs.*
NANCY J. WILSON'S ADM'R., Appellee.

Appeal from Lewis Circuit Court.

Be it remembered that on the 21st day of November A. D. 1906, the appellants by their attorney filed in the office of the Clerk of the Court of Appeals a certified copy of the judgment herein, and upon which judgment and appeal was granted a summons and copy issued, a supersedeas bond executed, and a supersedeas and copy issued and which are as follows:

2 Lewis Circuit Court.

J. W. MCDONALD, Adm'r NANCY J. WILSON, Plaintiff,
*vs.*
C. & O. RY. CO. & AL., Defendants.

The jury sworn herein on a former day of the present term of this court this day reappeared in their seats and having heard the

evidence in full, and received the instructions of the court and having heard the argument of counsel retired to their room and reappeared with the following verdict,

"We the jury find in favor of the plaintiff and fix the damage at the sum of three thousand, eight hundred and twenty six ($3826) dollars.

(Signed) J. S. MAVITY, *Foreman.*
W. C. LANG.
JAMES BLANKENSHIP.
J. D. TULLY.
NELSON EVAN.
J. H. JOHNSON.
W. G. HARRISON.
EPH ELLIS.
3–6 GEORGE HENSEL.
I. W. ADAMS.

It is therefore adjudged that the plaintiff, J. W. McDonald, administrator of Nancy J. Wilson, deceased, recover of the defendants, The Chesapeake and Ohio Railway Company and the Maysville and Big Sandy Railroad Company the sum of three thousand, eight hundred and twenty six dollars, ($3826) with interest thereon at the rate of six per cent. per annum from the 27th day of September 1906, until paid and his costs herein duly expended.

A copy,
Attest:

EUGENE A. JONES,
*Clerk Lewis Circuit Court.*

Filed Nov. 21, 1906.

J. MORGAN CHINN, *C. C. A.*

* * * * * * *

7 Filed Nov. 21, 1906. J. Morgan Chinn, C. C. A.

Court of Appeals of Kentucky.

CHESAPEAKE AND OHIO RY. CO., ETC., THE MAYSVILLE AND BIG SANDY R. R. CO., Appellant-,
*against*
NANCY J. WILSON'S ADM'R, Appellee.

*Supersedeas Bond.*

Whereas, said appellant- ha- taken an appeal from a judgment of the Lewis Court, rendered at its Sept. Term, 1906, against them in favor of the appellee for the sum of $3826.00 with interest at six per cent. per annum from September 27th 1906 until paid and for costs and the appellant- desire to supersede said judgment.

Now we Chesapeake and Ohio Ry. Co. etc. principal, and W. H. Wadsworth, securities, covenant to and agree with the appellee Nancy

J. Wilson's Adm'r that the appellant- will pay to the appellee all costs and damages that may be adjudged against the appellant- on the appeal; and also that they will satisfy and perform the said judgment in case it shall be affirmed, or any judgment or order which the court may render, or order to be rendered by the inferior court, not exceeding in amount or value the judgment aforesaid; and also pay all rents, hire, or damage, which during the pendency of the appeal, may accrue on any of the property of which the appellee is kept out of possession by reason of the appeal.

Witness our hands this 21 day of November 1906.

W. H. WADSWORTH,
By J. MORGAN CHINN,
*Att'y in Fact.*

Attest:
J. MORGAN CHINN, *C. C. A.*

Filed Nov. 21, 1906.

J. MORGAN CHINN, *C. C. A.*

8 And be it remembered that on the 18th day of March, 1907, the appellants by their attorney filed in the office of the Clerk of the Court of Appeals a transcript of the record, and on which transcript a summons and copy was issued, and which is in words and figures as follows:

9 Pleas before the Hon. S. G. Kinner, Judge of the Twentieth Judicial District of Kentucky, and Sole Judge of the Lewis Circuit Court, at the Court House, in Vanceburg, Lewis County, on the 22nd Day of September, 1906.

Be it remembered that on the 12th day of June, 1905, the plaintiff-, Nancy Wilson's Administrators, produced and filed in the Clerk's office of the Lewis Circuit Court the Mandate of the Court of Appeals against the defendants Chesapeake and Ohio Railway Company and others, and which is found recorded on page 2 of this record.

10 At a Circuit Court began and held for Lewis County at the Court House in Vanceburg, on the 5th day of September, 1905, the following order was made:

*Order Redocketing Suit.*

J. B. WILSON ET AL., Administrators of Nancy J. Wilson, Deceased, Plaintiff-,

*vs.*

CHESAPEAKE AND OHIO RAILWAY COMPANY ET AL., Defendants.

It is ordered that this cause be now redocketed.

At a Circuit Court began and held for Lewis County at the Court House in Vanceburg, on the 5th day of September, 1905, the following order was made:

*Order Noting Mandate Court Appeals.*

J. B. WILSON ET AL., Adm'rs, Plaintiffs,
*vs.*
C. & O. RY. CO ET AL., Defendants.

11 The plaintiff- having heretofore filed the Mandate of the Court of Appeals herein it is now ordered that same be recorded and is as follows:

*Mandate Court of Appeals.*

THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals, April 25th, 1905.

NANCY WILSON'S ADM'RS, Appellants,
*against*
C. & O. RY. CO. ET AL, Appellees.

Appeal from a Judgment of the Lewis Circuit Ct.

The Court being sufficiently advised, it seems to them the judgment herein is erroneous.
It is therefore considered that said judgment be reversed and cause remanded for further proceedings consistent with opinion herein, which is ordered to be certified to said court.
Issued June 9th, 1905.

J. MORGAN CHINN, *C. C. A.*,
By R. W. KEENCN, *D. C.*

At a Circuit Court began and held for Lewis County at the Court house in Vanceburg, on the 23rd day of May, 1906, the following order was made:

12 *Order Noting Death of Pl't'ff Wilson.*

J. B. WILSON ET AL., Adm'r-, Plaintiffs,
*vs.*
C. & O. RY. CO. ET AL., Defendants.

The death of the plaintiff J. B. Wilson, having been suggested of record it is ordered that this cause be continued for revivor.

At a Circuit Court began and held for Lewis County at the Court House in Vanceburg, on the 23rd day of May, 1906, the following order was made:

*Order Revivor.*

J. B. WILSON ET AL., Adm'rs, Plaintiffs,
*vs.*
——— ———.

It appearing to the court that the clerk through mistake has entered an order continuing the above styled cause for a revivor it is on motion ordered that said order be and the same is hereby set aside. It further appearing that the death of J. B. Wilson,
13 has been suggested of record, it is on motion ordered that this action be hereafter prosecuted in the name of the surviving co-administrator, J. W. McDonald, as Administrator of Nancy Wilson, deceased, plaintiff, *vs.* Chesapeake and Ohio Ry. Co. &c. defendants.

At a Circuit Court began and held for Lewis County at the Court House in Vanceburg, on the 19th day of September, 1906, the following order was made:

*Order Setting Cause for Trial.*

J. W. MCDONALD, Adm'r, Plaintiff,
*vs.*
C. & O. RY. CO. ET AL., Defendants.

By agreement it is ordered that this cause be set for trial on the 8th day of the present term, of court.

At a Circuit Court began and held for Lewis County at
14 the Court House in Vanceburg, on the 25th day of September, 1906, the following order was made:

*Order Overruling Motion to File Amend. Pet.*

J. W. MCDONALD, Adm'r, Plaintiff,
*vs.*
C. & O. RY. CO. ET AL., Defendants.

The plaintiff this day produced his amended petition herein and offered and moved to file the same to which the defendants objected, and the Court having considered of same and being sufficiently advised adjudges that said motion be overruled to which the plaintiff excepted.

Said amended petition is as follows:

*Amend. Pet. as Offered.*

Lewis Circuit Court.

J. W. McDONALD, Adm'r, Plaintiff,
*vs.*
C. & O. RY. CO. ET AL., Defendants.

15 The plaintiff by leave of court amends his petition herein and says that the defendants, their agents and servants for a year or more prior to the accident in question carelessly and negligently allowed or suffered dirt to accumulate on their right of way near the farm crossing — Nancy Wilson was killed and carelessly and negligently allowed or suffered weeds to grow on said accumulation of dirt so as to form an embankment and obstruction to the view of persons using said crossing; that by reason thereof the view of said Nancy Wilson was obstructed at the time of said accident, and as a consequence of which carelessness and negligence as well as other acts of negligence heretofore alleged the said Nancy Wilson was killed to plaintiff's damage in the sum of ten thousand dollars.

Wherefore plaintiff prays as in his petition and for all proper relief.

16 At a Circuit Court began and held for Lewis County at the Court house in Vanceburg, on the 25th day of September, 1906, the following order was made:

*Order Noting Jury.*

J. W. McDONALD, Adm'r, Plaintiff,
*vs.*
C. & O. RY. CO. ET AL., Defendants.

The parties appeared by their attorneys, thereupon came a jury—to-wit: J. D. Tully, W. C. Lang, J. S. Mavity, W. G. Harrison, Nelson Evans, Frank Bate, Chas. Aills, I. W. Adams, Jas. Blankenship, Harvey Johnson, George Hebsel, Eph Ellis, who were duly sworn to try the issue, and having heard the evidence in part and being unable to complete the trial were cautioned by the court and adjourned until 8:30 o'clock tomorrow morning.

At a Circuit Court began and held for Lewis County at the Court House in Vanceburg, on the 26th day of September, 1906, the following order was made:

17 *Order Noting Jury.*

J. W. McDONALD, Adm'r, Plaintiff,
*vs.*
——— ———.

The jury sworn herein on a former day of the present term of this court this day reappeared in their seats and having heard the evidence and being unable to complete the trial were cautioned by the court and adjourned until 8:30 o'clock tomorrow morning.

At a Circuit Court began and held for Lewis County at the Court House in Vanceburg, on the 27th day of September, 1906, the following order was made:

*Judgment.*

J. W. McDONALD, Adm'r, Plaintiff,
*vs.*
C. & O. RY. CO. ET AL., Defendants.

The jury sworn herein on a former day of the present term of this court this day reappeared in their seats and having
18 heard the evidence in full, and received the instructions of the court and having heard the argument of council retired to their room and reappeared with the following verdict:

"We the jury find in favor of the plaintiff and fix the damage at the sum of three thousand, eight hundred and twenty six ($3826) dollars.

(Signed) J. S. MAVITY, *Foreman.*
W. C. LANG.
JAMES BLANKENSHIP.
J. D. TULLY.
NELSON EVANS.
J. H. JOHNSON.
W. G. HARRISON.
EPH. ELLIS.
GEORGE HENSEL.
I. W. ADAMS.

It is therefore adjudged that the plaintiff, J. W. McDonald, Administrator of Nancy J. Wilson, deceased, recover of the defendants The Chesapeake and Ohio Railway Company, and The Maysville & Big Sandy Railroad Company the sum of three thousand,
19 eight hundred and twenty six dollars, ($3826) with interest thereon at the rate of six per cent. per annum from the 27th day of September, 1906, until paid, and his costs herein duly expended.

At a Circuit Court began and held for Lewis County at the court house in Vanceburg, on the 27th day of September, 1906, the following order was made:

*Order Noting Grounds & Motion for a New Trial.*

J. W. McDONALD, Adm'r, Plaintiff,
*vs.*
C. & O. RY. CO. ET AL., Defendants.

The defendants this day produced their motion and grounds for a new trial herein which are filed, and thereupon moved the court for a new trial of this cause and the court not being sufficiently advised took time.

20 At a Circuit Court began and held for Lewis County at the Court House in Vanceburg, on the 5th day of October, 1906, the following order was made:

*Order Overruling Motion for New Trial.*

J. W. McDONALD, Adm'r, Plaintiff,
*vs.*
C. & O. RY. CO. ET AL., Defendants.

The defendants this day called up their motion for a new trial of this cause, and the court having considered of same and being sufficiently advised adjudges that said motion be overruled to which the defendants excepted.

*Grounds for New Trial.*

Lewis Circuit Court.

NANCY WILSON'S ADM'R, Plaintiff,
*vs.*
C. & O. RY. CO. ET AL., Defendants.

21 The defendants come and move the court to set aside the verdict and judgment herein and to grant to them, and each of them a new trial of this action and they file in support of said motion these their reasons and grounds therefor as follows:

1. The court erred to the prejudice of the defendants, and each of them, in admitting certain incompetent, irrelevant, immaterial and illegal testimony to go to the jury on motion of the plaintiff, to which testimony the defendants in each instance objected before hand and to the ruling of the Court in each instance excepted.

2. The Court erred to the prejudice of the defendants, and each of them, in refusing to permit to go to the jury certain competent, relevant, material and legal testimony offered on motion of the de-

fendants, to which action of the court defendants, in each instance excepted.

3. The court erred to the prejudice of the defendants, and each of them, in giving to the jury, on its own motion, instruc-
22 tion- number- 1, 2, 3 and 4, to the giving of each of which instructions defendants objected before hand, and to the ruling of the court, in each instance excepted.

4. The Court erred to the prejudice of the defendants, and each of them, in refusing to give, on motion of defendants, to the jury, instruction No. 5, as offered, that is without the language added, thereto, to-wit: "Unless the jury further believe that "defendants' engineer saw that decedent was approaching the track without either looking or listening for the train or being aware of its approach in time to have prevented a collision with her."

and in giving said instruction with the said language added to it, to all of which the defendants objected, and to the ruling of the court in each instance excepted.

5. The Court erred to the prejudice of the defendants, and each of them, in refusing to give to the jury, on motion of defend-
23 ants, instructions A. and B. in handwriting of W. H. Wadsworth, and each of them marked "refused S. G. Kinner," to which ruling of the court the defendants in each instance excepted.

6. The Court erred to the prejudice of the defendants, and each of them, in refusing, on motion of defendants, at the end of plaintiff's evidence, to instruct the jury to find for the defendants, and each of them, to which ruling and action of the Court the defendants excepted.

7. The verdict is contrary to law.

8. The verdict is contrary to the evidence.

9. The verdict is not supported by any evidence.

10. The verdict is excessive and is plainly the result of passion or prejudice.

11. The verdict is palpably against the weight of the
24–242½ evidence and flagrantly so.

12. The verdict is contrary to the instructions of the Court.

13. The verdict and judgment *is* not authorized by the pleadings.

14. The verdict is for too much.

* * * * * * *

243 *Summons on Appeal.*

The Commonwealth of Kentucky to the Sheriff of Lewis County, Greeting:

We command you to summon J. W. McDonald, as Administrator of Nancy Wilson, deceased, to appear before the Judges of the Court of Appeals of Kentucky, at the Capitol in Frankfort, on the first day of their next April Term, to show cause, if any He can, why a judgment obtained by Him in the Lewis Circuit Court against Chesapeake and Ohio Railway Company *et al.* at its September Term,

1906, should not be reversed for the errors therein contained, as we from Their complaint are informed, and have then and there this writ.

Witness, J. Morgan Chinn, Clerk of our said Court, at the Capitol aforesaid, this 18th day of March, 1907.

J. MORGAN CHINN, *C. C. A.*,
By R. W. KEENON, *D. C.*

[Endorsed:] Court of Appeals. C. & O. Ry. Co. &c. *vs.* Nancy Wilson's Adm'r. Summons. 1 Copy. To April Term, 1907. Lewis County.

Executed the within Summons March 19" 1907, by delivering a true copy thereof to J. W. McDonald, Adm'r of Nancy Wilson.

M. BERTRAM, *S. L. C.*,
By W. M. ORCUTT, *D. S.*

244 And with the said transcript the appellants by their Att'y filed a Statement and which is in words and figures as follows:

*Statement.*

245 Court of Appeals of Kentucky.

CHESAPEAKE & OHIO RAILWAY COMPANY & AL., Appellants,
*vs.*
J. W. McDONALD, as Administrator of Nancy Wilson, Deceased, Appellees.

*a.* The Chesapeake and Ohio Railway Company and Maysville and Big Sandy Railroad Company, appellants.

*b.* J. W. McDonald, administrator of Nancy Wilson, deceased, appellee.

*c.* Judgment was rendered at the September term, 1906, of the Lewis Circuit Court, and on the 27th day of September, 1906, and may be found on page seventeen of the transcript herein.

*d.* Issue Summons for J. W. McDonald, administrator &c., directed to Lewis County, Kentucky.

W. H. WADSWORTH,
*Att'y for Appellants.*

246 Be it remembered that at a Court of Appeals held at the Capitol at Frankfort on the 7th day of May 1907 the following order was entered to-wit:

C. & O. RY. CO., ETC.,
*v.*
WILSON'S ADM'R.
Lewis.

Came the appellee by counsel and on motion said case is ordered advanced under Rule XVI.

And afterwards at a Court of Appeals held at the Capitol at Frankfort on the 15th day of May 1907 the following order was entered, to-wit:

C. & O. Ry. Co., etc.,
*v.*
Wilson's Adm'r.

Lewis.

This case is ordered to be submitted.

And afterwards at a Court of Appeals held at the Capitol at Frankfort on the 5th day of June, 1907, the following judgment was entered to-wit:

Chesapeake and Ohio Railway Co., etc., Appellant-,
*vs.*
Nancy Wilson's Adm'r, Appellee.

Appeal from the Lewis Circuit Court.

The Court being sufficiently advised it seems to them there is no error in the judgment herein.

247 It is therefore considered that said judgment be affirmed and that the appellee recover of the appellants ten per cent. damages on the amount of the judgment superseded herein which is ordered certified to said Court.

It is further considered that the appellee recover of the appellants his costs herein expended.

And on said date the Court delivered the following opinion.

248 Court of Appeals of Kentucky, June 5, 1907.

Chesapeake & Ohio Railway Company, Appellant,
*vs.*
Nancy J. Wilson's Adm'r, Appellee.

Appeal from Lewis Circuit Court.

Opinion of the Court by Judge Carroll:

This is the second appeal of this case. The opinion heretofore delivered may be found in 27 Ky. L. R., 778. As the facts are there fully and correctly stated, we will not repeat them.

A reversal is asked because of alleged error in granting and refusing instructions, and excluding competent evidence.

249 The engineer and fireman were asked whether the whistle was sounded for the road crossing west of the private crossing at which appellee was killed by a fast passenger train going east. They each answered that they did not remember whether it was or not. Each was then asked—"Have you any

judgment about what you did that day?" To this question objection was sustained and an avowal made that each witness if he was permitted to answer would say that it was the custom of the engineer to whistle and they were satisfied that he performed his duty although they had no recollection of it at the time they testified. In view of the fact that both the engineer and fireman stated positively that they did not remember whether the whistle was sounded or not, it cannot be said that it was error to refuse to permit an expression of opinion on the subject. If the engineer and fireman had no recollection whatever about the matter, their opinion that the whistle was sounded would be of little value; and even had they been permitted to express an opinion concerning it, it is fair to assume that the result of the trial would not have been affected. A number of witnesses testified positively that the whistle was not sounded, and appellant could not have been prejudiced by the failure to permit these employés to express an opinion touching a matter about which neither of them had any knowledge.

250 The jury were instructed in substance that it was the duty of the agents in charge of the train that killed decedent to sound the whistle or ring the bell on approaching the public crossing, and if they believed from the evidence that it was customary for the deceased when using the private crossing to and she did rely upon the signals given for the public crossing, and further believe that the whistle was not sounded or the bell rung, and by reason of the failure in this respect deceased while exercising ordinary care for her own safety was struck and killed, they should find for the plaintiff. They were further told that it was the duty of the deceased in approaching the crossing where she was killed to look along the track in both directions for trains that might be approaching before starting to go across the railroad, and it was also her duty to listen for approaching trains before attempting to cross, and if they believed that by looking and listening she would have been warned of the approach of the train in time to have avoided coming in collision with it, they should find for the company; although they might believe its employés were guilty of negligence;

251 unless they further believed that the engineer saw in time to have prevented striking her, that decedent was approaching the track without either looking or listening or being aware of approach of the train and also that if the company undertook to maintain the private crossing and negligently allowed a pile of dirt to accumulate on one side thereof, which obstructed the view of decedent while attempting to use the crossing to such an extent that she could not by the exercise of ordinary care observe an approaching train, and that by reason of such negligence she was struck and killed, they should find for the plaintiff.

The instruction imposing upon the decedent the duty of looking and listening for the approach of a train before she attempted to cross the track was more favorable to appellant than the law authorizes. It is not and never has been the rule in this State that persons rightfully using crossings must either stop or look or listen for the approach of trains. The only duty imposed upon them is to exercise ordinary care,—that is, such care as an ordinarily pru-

dent person would exercise under like conditions and similar
252 circumstances; and the jury were informed that there could be no recovery for appellee unless the deceased exercised this degree of care.

Counsel for appellant concede that the court properly instructed the jury in respect to the negligence of the company in permitting a pile of dirt to remain and obstruct a view of the railroad from the crossing, but insist that the court should also have instructed the jury that if this pile of dirt prevented the decedent from seeing an approaching train then it was her duty on that account to exercise greater care in going on or across the track, and such care as was commensurate with the increased danger. The court did more than it was asked to do by this instruction, as it imposed on plaintiff not only the duty of exercising great care, but required that she must look and listen. So that, in view of the instruction given by the court, appellant cannot justly insist that it was prejudiced by the failure to give the one asked.

Complaint is made that it was error to qualify the instruction as to contributory neglect, by making the company liable if the engineer saw decedent approaching the track without looking for
253 the train in time to have prevented striking her. There was evidence that when decedent emerged from behind the pile of dirt, which was only a few feet from the track, that the engineer by the exercise of ordinary care could have seen her and should have known that she was going upon the track unaware of the approach of the train in time to have avoided striking her. In view of this evidence it was competent to submit this question to the jury, as if the persons in charge of the train discovered the imminent peril in which the deceased was placed, it was their duty to exercise ordinary care to prevent the injury.

The road crossing for which it was the duty of appellant's agents to sound the whistle and ring the bell was a mile from the private crossing, and it is argued that the distance is too great to entitle persons at the private crossing to rely on the signals given for the public crossing. There is no doubt that signals given at the public crossing could be plainly heard at the private crossing, and that persons using the private crossing relied upon them, and this being true it is not important that the distance between them was
254 a mile,—the material inquiry being, did persons using the private crossing rely on the signals for the public crossing and could they be plainly heard. When these two conditions concur, and the company is remiss in its duty, it becomes liable in damages to persons using the private crossing who are injured by its negligence. Cahill *v.* Cincinnati R. Co., 92 Ky., 345.

The facts in the case of Louisville & Nashville R. Co. *v.* Survant, 19 Ky. L. R., 1576, relied on by appellant, are so different from those here presented, that the conclusions arrived at in that case are not at all applicable to this.

Perceiving no error the judgment, is affirmed.

W. H. Wadsworth, Le Wright Browning, Worthington & Coehran, for Appellant.

Allan D. Cole, Thos. R. Phister, R. D. Wilson, for Appellee.

255 Be it remembered that on the 24th day of July 1907 there was filed in the office of the Clerk of the Court of Appeals, an Assignment of Errors and which is hereto attached as follows:

256 Supreme Court of United States.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY and MAYSVILLE AND BIG SANDY RAILROAD COMPANY, Plaintiffs in Error,
*vs.*
J. W. MCDONALD, as Administrator of Nancy J. Wilson, Deceased, Defendant in Error.

*Assignment of Errors.*

The Chesapeake and Ohio Railway Company and Maysville and Big Sandy Railroad Company, plaintiffs in error in the above entitled cause, complain of the judgment rendered herein by the Court of Appeals of Kentucky, and for error therein assign the following:

1st. The court erred in affirming the judgment of the Lewis Circuit Court, whereas it should have reversed the same with directions not to proceed in said cause.

2d. The court erred in holding in substance and effect that The Chesapeake and Ohio Railway Company had no right under the Constitution and laws of the United States, after the suit had been discontinued by appellees against the individual defendants, to remove the cause pending in the Lewis Circuit Court, which was then against it and the Maysville and Big Sandy Railroad Company only, to the Circuit Court of the United States for the Eastern District of Kentucky, and that the said The Chesapeake and Ohio Railway Company had no right under the Constitution and laws of the United States to have said cause removed as aforesaid.

3d. The court erred in holding that the Lewis Circuit Court had any right to proceed further in the said cause after the said petition to remove the same on behalf of The Chesapeake and Ohio Railway Company had been filed in the said Lewis Circuit Court.

4th. The court erred in holding that the proceedings in the Lewis Circuit Court after the filing of the petition of The Chesapeake and Ohio Railway Company for the removal of the said cause to
257 the Circuit Court of the United States for the Eastern District of Kentucky, were not void and of no force and effect.

W. H. WADSWORTH,
WORTHINGTON & COCHRAN,
*Attorneys for Plaintiffs in Error, The Chesapeake and Ohio Railway Company and Maysville and Big Sandy Railroad Company.*

Filed Jul- 24, 1907.
J. MORGAN CHINN, *C. C. A.*

258 And on said date there was filed in the office of the Clerk of the Court of Appeals, a Writ of Error from the Supreme

Court of the United States, and the order allowing same, and which is attached as follows:

259 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea before you, or some of you, being the highest court of law or equity of the State in which a decision could be had in the suit between The Chesapeake and Ohio Railway Company and the Maysville and Big Sandy Railroad Company, appellants, and J. W. McDonald, administrator of Nancy J. Wilson, deceased, appellee, wherein was drawn in question a right and authority existing under the laws of the United States, and the decision was against the exercise of such right and authority, and wherein was drawn in question the construction of a statute of the United States and the decision was against the title, right, privilege or exemption, specially set up and claimed, under said statute of the United States, a manifest error hath happened to the great damage of the said The Chesapeake and Ohio Railway Company and Maysville and Big Sandy Railroad Company, as by their complaint appears; We, being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have same
260 at Washington within thirty days from the date hereof, in the said Supreme Court of the United States, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this the 15th day of July, in the year of our Lord, One Thousand Nine Hundred and Seven.

[Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

WALTER G. CHAPMAN,
*Clerk U. S. Circuit Court for the Eastern District of Kentucky, at Frankfort.*

Approved & allowed July 15, 1907.

ED. C. O'REAR,
*Chief Justice Court of Appeals of Kentucky.*

Filed Jul- 24, 1907.

J. MORGAN CHINN, *C. C. A.*

261 And on said date there was filed in the office of the Clerk of the Court of Appeals, a Writ of Error Bond, and which is in words and figures as follows to-wit:

262 Court of Appeals of Kentucky.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY and MAYSVILLE AND BIG SANDY RAILROAD COMPANY, Appellants,

*vs.*

J. W. McDONALD, Administrator of Nancy J. Wilson, Deceased, Appellee.

*Bond.*

Know all men by these presents, That We, The Chesapeake and Ohio Railway Company and Maysville and Big Sandy Railroad Company, principals, and John G. Wadsworth, as surety, are held and firmly bound unto J. W. McDonald, administrator of Nancy J. Wilson, deceased, in the sum of Five Thousand Dollars to be paid to the said obligee herein; to which payment well and truly to be made, we bind ourselves, jointly and severally, and each of our executors, heirs, successors and administrators, firmly by these presents.

Sealed with our seals and dated this 15th day of July, 1907.

Whereas, the above named The Chesapeake and Ohio Rail-
263 way Company and Maysville and Big Sandy Railroad Company, have prosecuted a Writ of Error from the Supreme Court of the United States to reverse the judgment rendered in the above entitled cause by the Court of Appeals of Kentucky, the said Writ of Error to operate as a Supersedeas, now therefore, the condition of this obligation is such that if the above named The Chesapeake and Ohio Railway Company and Maysville and Big Sandy Railroad Company shall prosecute their said Writ of Error to effect and answer to the judgment herein rendered, damages and all costs, if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE CHESAPEAKE & OHIO RAILWAY CO.,
MAYSVILLE & BIG SANDY RAILROAD COMPANY,
By JOHN G. WADSWORTH, [SEAL.]
*Attorney.*
JOHN G. WADSWORTH. [SEAL.]

Approved July 15, 1907.
ED. C. O'REAR,
*Chief Justice Court of Appeals of Kentucky.*

Filed Jul- 24, 1907.
J. MORGAN CHINN, *C. C. A.*

264 And on said date there was filed in the office of the Clerk of the Court of Appeals, the Citation, and proof of service endorsed thereon and which is hereto attached as follows—

265 UNITED STATES OF AMERICA, *ss:*

The President of the United States to J. W. McDonald, Administrator of Nancy J. Wilson, deceased, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the State of Kentucky, wherein The Chesapeake and Ohio Railway Company and Maysville and Big Sandy Railroad Company are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this July 15, in the year of our Lord, One Thousand Nine Hundred and Seven.

ED. C. O'REAR,
*Chief Justice Court of Appeals of Kentucky.*

Service waived and notice accepted this 19th day of July, 1907.

ALLAN D. COLE,
*Counsel for Def't in Error.*

Filed Jul- 24, 1907.
J. MORGAN CHINN, *C. C. A.*

266 & 267 THE COMMONWEALTH OF KENTUCKY, *set:*

The Court of Appeals.

In obedience to the commands of the within Writ of Error, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record, and proceedings in the case named in said writ, with all things concerning the same.

In testimony whereof, I have hereunto set my hand and affixed the official seal of my office.

Done at the Capitol at Frankfort on this the 25 day of July, A. D. 1907.

[Seal Court of Appeals, Kentucky.]

J. MORGAN CHINN,
*Clerk Court of Appeals of Kentucky.*

268 Supreme Court of the United States.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY and MAYSVILLE AND BIG SANDY RAILROAD COMPANY, Plaintiffs in Error,
*vs.*
J. W. McDONALD, Administrator of Nancy J. Wilson, Deceased, Defendant in Error.

*Statement Pursuant to Sub-division 9 of Rule 10 of the Supreme Court.*

Now comes The Chesapeake and Ohio Railway Company and Maysville and Big Sandy Railroad Company, plaintiffs in error in the above entitled cause, and state, pursuant to sub-division 9 of Rule 10 of the Supreme Court, that the errors on which they intend to rely on this writ of error are as follows:

1st. The court erred in affirming the judgment of the Lewis Circuit Court, whereas it should have reversed the same with directions not to proceed in said cause.

2d. The court erred in holding in substance and effect that The Chesapeake and Ohio Railway Company had no right under the Constitution and laws of the United States, after the suit had been discontinued by appellees against the individual defendants, to remove the cause pending in the Lewis Circuit Court, which was then against it and the Maysville and Big Sandy Railroad Company only, to the Circuit Court of the United States for the Eastern District of Kentucky, and that the said The Chesapeake and Ohio Railway Company had no right under the Constitution and laws of the United States to have said cause removed as aforesaid.

3d. The court erred in holding that the Lewis Circuit Court had any right to proceed further in the said cause after the said petition to remove the same on behalf of The Chesapeake and Ohio Railway Company had been filed in the said Lewis Circuit Court.

269 4th. The court erred in holding that the proceedings in the Lewis Circuit Court after the filing of the petition of The Chesapeake and Ohio Railway Company for the removal of the said cause to the Circuit Court of the United States for the Eastern District of Kentucky, were not void and of no force and effect.

The parts of the record which said plaintiffs in error think necessary for the consideration of said errors are as follows:

From Volume One of Transcript.

The original petition of defendant in error, and his then co-plaintiff, J. B. Wilson, since deceased, as administrators of the estate of Nancy J. Wilson, deceased, against plaintiffs in error, and *an*others, and the Clerk's order noting the filing of same,—pages 2 to 7 inclusive.

The summons thereon and return,—pages 8 and 9.

The order of the Lewis Circuit Court filing the petition for removal to the United States Circuit Court, for the Eastern District of

Kentucky, and the order of the court thereon,—pages 9, 10 and 11.

Order of the Lewis Circuit Court filing the answer of the plaintiffs in error, and said answer,—pages 11 to 15 inclusive.

Order of the Lewis Circuit Court filing the reply of said plaintiffs, and said reply,—pages 16 and 17.

Order of the Lewis Circuit Court reciting that this cause had been remanded thereto by the United States Circuit Court
270 for the Eastern District of Kentucky, and its order redocketing the same,—pages 17 and 18.

Order allowing plaintiffs in error to amend their answer upon its face,—page 18.

Order of said court allowing said plaintiffs to amend their petition on its face,—pages 18 and 19.

Agreed order substituting copy of original petition for said original, which was lost,—page 19.

Order dated January 19, 1903, filing the written motion of said plaintiffs, and said motion to dismiss their petition without prejudice against Frank Fisher, James McCloud, —— Fairhead, —— Fox, and —— Snedeger, the conductor, engineers and fireman of the train by which said plaintiffs' intestate was killed, and the order of the court sustaining said motion and allowing said dismissal,—pages 20 and 21.

The order of the Lewis Circuit Court dated January 21, 1903, filing the petition of plaintiff in error, The Chesapeake and Ohio Railway Company, to remove this cause to the United States Circuit Court for the Eastern District of Kentucky, and its order approving said bond and overruling said motion to remove, and said petition for removal and said bond,—pages 21 to 29 inclusive.

Order of the Lewis Circuit Court filing the amended answer of plaintiffs in error and said amended answer,—pages 30 and 31.

Order filing the amended petition of defendant in error and his then co-plaintiff, and the order setting aside the next pre-
271 ceding order,—pages 31 and 32.

Order making said amended petition a part of the record, and said amended petition,—pages 33 and 34.

Orders of said court showing the production of said plaintiffs' amended petition and orders in relation thereto,—on pages 35 and 36.

Said amended petition,—pages 36, 37 and 38.

Order of the court showing offering by said plaintiffs of an amended petition, and its order filing same and said amended petition,—pages 38, 39 and 40.

Written motion of defendants in error, order of court filing the same and its ruling thereon,—pages 40 and 41.

Written motion of defendants in error and order of court filing the same, and its order striking out certain parts of plaintiffs' original petition,—pages 41 and 42.

Order filing amended petition of plaintiffs and said amended petition,—pages 42, 43 and 44.

Demurrer to said amended petition of plaintiffs in error and the order of the court overruling the same,—pages 44 and 45.

Order filing the amended answer of plaintiffs in error and said amended answer,—pages 45 to 48 inclusive.

Agreed order traversing all the affirmative allegations in the pleadings of both parties,—page 49.

Order of submission and empaneling a jury, the order adjourning the same until the next morning, and the verdict of
272 said jury, and the judgment thereon dismissing plaintiffs' petition,—pages 49, 50 and 51.

Order noting the motion of plaintiffs for a new trial, the judgment of the court overruling same,—pages 51 and 52.

Order filing bill of exceptions and granting appeal to the Court of Appeals,—pages 53 and 54.

Plaintiffs' said ground and motion for a new trial,—pages 55 and 56.

Statement on appeal to Court of Appeals,—page 130.

Order of the Court of Appeals submitting this case and its order reversing the judgment and opinion thereon,—pages 130 to 141 inclusive.

Order of said court filing the petition, and motion, of plaintiffs in error, for rehearing,—page 142.

Order of said court overruling said motion and petition,—page 153.

From Volume Two of Transcript.

Order of Clerk of Court of Appeals of Kentucky showing filing of judgment of Lewis Circuit Court, and the granting of appeal therefrom, the verdict of the jury and said judgment,—pages 1 to 3.

The appeal bond of plaintiffs in error on said appeal in
273 Court of Appeals,—page 7.

Order of the Lewis Circuit Court made June 12, 1905, filing mandate of Court of Appeals, and ordering this cause redocketed,—pages 9, 10 and 11.

Order noting death of J. B. Wilson, pages 11 and 12.

Order of the court directing that this action be thereafter prosecuted in the name of J. W. McDonald, as administrator of Nancy J. Wilson, deceased,—pages 12 and 13.

Order of said court filing the amended petition of the defendants in error, and said amended petition,—pages 14 and 15.

Orders empaneling and continuing the jury, the verdict of the jury, and the judgment thereon,—pages 16, 17, 18 and 19.

Order noting the motion of plaintiffs in error for a new trial, and order overruling same and said motion and grounds, pages 19 to 24 inclusive.

Summons on defendant in error on appeal of plaintiffs in error to the Court of Appeals of Kentucky, and the return on said summons,—page 243.

Statement on the appeal filed by plaintiffs in error in the Court of Appeals of Kentucky,—page 245.

Orders of the Court of Appeals of Kentucky advancing said cause under Rule 16 of said court, and its order submitting said cause,

and affirming the judgment of the Lewis Circuit Court,—pages 246 and 247.

274 Opinion of Court of Appeals of Kentucky on said judgment of affirmance delivered by Judge Carroll,—pages 248 to 254 inclusive.

Assignment of errors of plaintiffs in error in this court, and the writ of error therefrom to the Court of Appeals of Kentucky, and the allowance of said writ signed by Ed C. O'Rear, Chief Justice of the Court of Appeals of Kentucky, and the writ of error bond filed in the office of the Clerk of Court of Appeals of Kentucky, and the endorsement on said order by said Chief Justice of the Court of Appeals of Kentucky approving said bond on July 15, 1907, and the citation and proof of service thereof of said writ, and the waiver of said service and acceptance of the notice thereon signed by Allan D. Cole, counsel for defendant in error,—pages 256, 257, 258, 259, 260, 261, 262, 263, 264 and 265.

W. H. WADSWORTH,
E. L. WORTHINGTON,
*Counsel for Plaintiffs in Error.*

Service waived and notice accepted this 6th day of August, 1907.

ALLAN D. COLE,
*Counsel for Defendant in Error.*

275 [Endorsed:] File No. 20,824. Supreme Court U. S. October Term, 1907. Term No. 421. The Chesapeake & Ohio Ry. Co. *et al.*, Pl'ffs in Error, *vs.* J. W. McDonald, Adm'r &c. Assignment of errors and designation by P. E. of parts of record to be printed, with notice and acceptance of service of same. Filed Aug. 10, 1907.

Endorsed on cover: File No. 20,824. Kentucky court of appeals. Term No. 158. The Chesapeake and Ohio Railway Company and The Maysville and Big Sandy Railroad Company, plaintiffs in error, *vs.* J. W. McDonald, administrator of Nancy J. Wilson, deceased. Filed August 10, 1907. File No. 20,824.

18

Office Supreme Court, U. S.
FILED.
OCT 14 1907
JAMES H. McKENNEY,
CLERK.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1907

NO. 158.

**The Chesapeake and Ohio Railway Company, etc.,**
*Plaintiffs in Error,*

*vs.*

**J. W. McDonald, Administrator of Nancy Wilson, deceased,**
*Defendant in Error.*

## MOTION TO ADVANCE UNDER RULE 32

ALLAN D. COLE,
THOS. R. PHISTER,
*Counsel for Defendant in Error.*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1907

No.

**The Chesapeake and Ohio Railway Company, etc.,**

*Plaintiffs in Error,*

*vs.*

**J. W. McDonald, Administrator of Nancy Wilson, deceased,**

*Defendant in Error.*

## MOTION TO ADVANCE UNDER RULE 32

Comes now the defendant in error herein, J. W. McDonald, as Administrator of Nancy Wilson, deceased, in his own proper person, and moves the Court to advance the above-entitled cause, pursuant to Rule 32, because the only question in issue is whether there was such diversity of citizenship in the joinder of the lessor domestic corporation with the lessee foreign corporation, that under the Removal Statute, the Lewis

Circuit Court had jurisdiction to render the judgment or decree, affirmed by the Court of Appeals of Kentucky, from which latter court's judgment the writ of error of the plaintiffs in error herein purports to have been prosecuted to this court: or whether jurisdiction belonged to the United States Circuit Court for the Eastern District of Kentucky.

J. W. McDONALD,
*As Administrator of Nancy Wilson, deceased,*
*Defendant in Error.*

J. W. McDonald. Administrator
of Nancy Wilson Deceased
Defendant in Error

## BRIEF OF ARGUMENT.

*May it Please the Court:*

The only question in issue herein is the question of jurisdiction of the court below. Prior to the amendment of Rule 32, this court held that a writ of error to a State court which had refused a motion to remove, might be advanced as within the spirit, although not within the letter of said Rule, regarding advancement of causes remanded by the Circuit Court. *Burlington C. R. & N. Co.* vs. *Dunn, 121 U. S., 182.*

Since the amendment of Rule 32, this case is entitled to be advanced under section 5, Act of 1891, as being also within the letter thereof. *Aspen Min. & Sm. Co.* vs. *Billings, 150 U. S., 31.*

Respectfully submitted,

J. W. McDONALD,
*As Administrator of Nancy Wilson, deceased,*
*Defendant in Error.*

J. W. McDonald admin of
Nancy Wilson Deceased
Defendant in Error

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

*Plaintiffs in Error.*

vs.

[redacted]

*Defendant in Error.*

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# WRIT OF ERROR TO THE COURT OF APPEALS OF KENTUCKY

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## BRIEF FOR PLAINTIFFS IN ERROR

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E. L. WORTHINGTON,
*Counsel for Plaintiffs in Error.*

W. H. WADSWORTH,
W. D. COCHRAN,
LAWRIGHT BROWNING,
*Of Counsel.*

# Supreme Court of the United States

OCTOBER TERM, 1908

NO. 158

**Chesapeake & Ohio Railway Company and Maysville & Big Sandy Railroad Company** - - - - *Plaintiffs in Error,*

*vs.*

**J. W. McDonald, Administrator of Nancy J. Wilson, deceased** - *Defendant in Error.*

## BRIEF FOR PLAINTIFFS IN ERROR

### STATEMENT

*May it Please the Court:*

Plaintiff in error, the Chesapeake and Ohio Railway Company, is a corporation organized under the laws of Virginia, and plaintiff in error, the Maysville and Big Sandy Railroad Company, is a corporation organized under the laws of Kentucky. The latter company owns a railroad track running through Lewis County, Kentucky, and several other counties of that state. Prior to the year 1890 it leased this road to the Chesapeake and Ohio Railway Company, pursuant to a power

so to do granted to it by the Legislature of Kentucky, by an amendment to its charter passed February 17, 1866. That this amendment empowered it to make the lease in question was explicitly decided by the Kentucky Court of Appeals in *McCabe's Admr.* v. *Maysville & Big Sandy R. Co.*, *23 Ky. L. Rep.*, *2328*.

This suit was brought by the Administrators of Nancy Wilson, deceased, on March 23, 1900, against the two plaintiffs in error and against five employes of the Chesapeake and Ohio Railway Company to recover damages for her death caused, as alleged, by negligence in the operation of said road, by reason of which she was run against and killed at a highway crossing in Lewis County, Kentucky, by a train of the Chesapeake and Ohio Railway Company, then being operated by said individual defendants as conductor, engineer and fireman. Pending the suit one of said administrators died and the action was continued by the survivor, the present defendant in error.

It is distinctly alleged in the petition that at the time of the accident and prior thereto said railroad was operated by the Chesapeake and Ohio Railway Company under said lease to it from the Maysville and Big Sandy Railroad Company. The latter company was sued on the alleged ground that it made said lease "without legal authority, and without authority or warrant, and same therefore was and is void."

The allegation that said lease was made "without legal authority," is simply an allegation that the Legislature of Kentucky had never authorized the Maysville and Big Sandy Railroad Company to lease its road to the Chesapeake and Ohio Railway Company. This is not an allegation of a *fact*, but of

a legal conclusion. The Kentucky Court of Appeals have decided, in the *McCabe case* above cited, that this lease was authorized by law. The Kentucky Code of Procedure forbids the statement of legal conclusions in a pleading; hence the petition must be construed just as if that allegation were eliminated from it.

On May 11th, 1900, the Chesapeake and Ohio Railway Company filed in the Lewis Circuit Court its petition to remove the case to the Circuit Court of the United States for the District of Kentucky. On May 29th the Lewis Circuit Court ordered the cause transferred to said United States court. [Page 5, printed record.]

Said cause was docketed in said United States court, and thereafter it was remanded to the state court. On September 3d, 1902, it was redocketed in the state court.

The order remanding the case was palpably right. The employes of the Chesapeake and Ohio Railway Company were joined as defendants to the original petition, and a joint cause of action alleged against them and their employer. They were citizens of Kentucky, the same state as plaintiffs. The judgment of the United States court that the cause was not removable was based on the same state of facts on which this court in the cases of *Alabama & Great Southern R. Co.* v. *Thompson, 200 U. S., 218*, and *Cincinnati &c., R. Co.* v. *Bohon, 200 U. S., 226*, held such an action not to be removable.

On the 19th of Jannary, 1903, after the cause had been remanded and redocketed in the Lewis Circuit Court, defendant in error voluntarily and on his own motion discontinued the

suit as against all five of the individual defendants, the employes of the Chesapeake and Ohio Railway Company, thus leaving the suit one against the two railroad companies alone. [Page 10, printed record.] Thereupon, the Chesapeake and Ohio Railway Company promptly presented to that court another petition to remove the cause to the United States Circuit Court on the ground that it became a removable cause when the individual defendants were voluntarily dismissed from it. [Pages 11, 12 and 13, printed record.] That court, by an order, approved the bond filed with the petition for removal, but overruled the motion to remove.

Subsequently issues were joined, and the suit was tried in the Lewis Circuit Court before a jury, which returned a verdict, under the direction of the court, for defendants, (now plaintiffs in error.) On appeal to the Court of Appeals of Kentucky the judgment rendered on this verdict was reversed and the cause remanded for a new trial. Another trial before a jury in the Lewis Circuit Court resulted in a verdict and judgment in favor of defendant in error for $3,826.00, which on appeal to the Court of Appeals was affirmed. The present writ of error is from said judgment of affirmance.

The errors relied on are:

*First.*—The court erred in affirming the judgment of the Lewis Circuit Court, whereas it should have reversed the same with directions not to proceed in said cause.

*Second.*—The court erred in holding in substance and effect that the Chesapeake and Ohio Railway Company had no right under the Constitution and laws of the United States, after the suit had been discontinued by

appellees against the individual defendants, to remove the cause pending in the Lewis Circuit Court, which was then against it and the Maysville and Big Sandy Railroad Company only, to the Circuit Court of the United States for the Eastern District of Kentucky, and that the said the Chesapeake and Ohio Railway Company had no right under the Constitution and laws of the United States to have said cause removed as aforesaid.

*Third.*—The court erred in holding that the Lewis Circuit Court had any right to proceed further in the said cause after the said petition to remove the same on behalf of the Chesapeake and Ohio Railway Company had been filed in the said Lewis Circuit Court.

*Fourth.*—The court erred in holding that the proceedings in the Lewis Circuit Court after the filing of the petition of the Chesapeake and Ohio Railway Company for the removal of the said cause to the Circuit Court of the United States for the Eastern District of Kentucky, were not void and of no force and effect.

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## ARGUMENT

In *Powers* v. *Chesapeake & Ohio Ry. Co., 169 U. S., 92*, it was decided that a petition for removal may be filed as soon as the cause becomes a removable one, though after the time the defendant is required to answer by the law of the state. In that case, as in this, a petition for removal had been filed and the case docketed in the United States court. Thereafter the United States court remanded it to the state court. Afterward the plaintiff discontinued the suit as against the individual

defendants who were citizens of the same state with plaintiff. A second petition for removal was then filed. This court held that it was filed in time and that the removal was proper.

The sole question involved on the present writ of error is,—Did the Lewis Circuit Court err in refusing to remove the case, after the suit was discontinued against the individual defendants? In other words,—Is the cause of action against the lessor of railroad for a tort of its lessee in operating the road, where the lease is expressly authorized by statute, a joint cause of action with one against the lessee for committing the tort?

The question is not whether the pleader *thought* he was stating a joint cause of action against the lessor and lessee of the railroad, but did he, in fact, state a joint cause of action against them? The petition negatives the idea that the Maysville and Big Sandy Railroad Company had any *control* over the operation of the train which killed the intestate.

There are three grounds only on which one person can be held liable for a tort committed by another.

1. One is, on the ground that the tort feasor was his servant and under his control. He is liable in such case under the doctrine of *respondeat superior.*

2. Another is, that the liability for the other person's tort is imposed by a statute.

3. Another is, that he has assumed such liability by his *contract;* he has *agreed* that the wrongdoer will not commit the tort in question, or, (what amounts to the same thing,) has *agreed* to be liable for that other's tort. His liability in such

case is based entirely on his contract. A familiar instance of such liability by contract for another's tort is that of a *surety* on an official bond, or any sort of warranty against the wrongs of another.

(1) The power to *control* is the test of liability under the doctrine of *respondeat superior*. *Brady* v. *Chicago Ry. Co.*, *114 Fed.*, *107*. No facts are stated in the petition of defendant in error which even tend to show that the lessor company had any *control* whatever over the actions of its lessee in the operation of the leased road. The Kentucky Court of Appeals have explicitly decided that the amendment to the lessor's charter, passed by the Legislature of Kentucky in February, 1866, gave to it the power to make the lease in question. *McCabe* v. *Maysville & Big Sandy R. Co.*, *23 Ky. L. Rep.*, *2328*.

The legal relation of lessor and lessee—of landlord and tenant—is totally different from the relation of master and servant. A lease is not a contract of employment. It is an executed transfer of *property*. The idea that inheres in the legal word, "lease," is that possession and control of the leased property is *transferred* from the lessor to the lessee. It is a contradiction in terms to say that property is *leased*, and that the lessor remains in possession and control of it.

So that the liability of the lessor company can not be based upon the doctrine of *respondeat superior*. And, (what is more important in this case,) the Kentucky Court of Appeals does not base its decision that the lessor is liable for the tort of its

lessee on the doctrine of *respondeat superior*. That court does not reason out, or attempt to reason out, that the lessor company has any *control* over the acts of the lessee in operating its trains, or that the relation of master and servant exists between the lessor of a railroad and its lessee. No court has held more firmly to the doctrine that the power to control is the test of liability under the doctrine of *respondeat superior* than has the Kentucky court. *Strauss* v. *City of Louisville*, *108 Ky., 158; Beaumeister* v. *Markham*, *101 Ky., 131; Robinson* v. *Webb*, *11 Bush, 475; Central Coal & Iron Co.* v. *Grider*, *115 Ky., 745; Jahn* v. *McKnight Co.*, *117 Ky., 655.*

Hence, the point discussed and decided by this court in *Chesapeake & Ohio Ry. Co.* v. *Dixon*, *179 U. S., 131*, and *Alabama & Great Southern R. Co.* v. *Thompson*, *200 U. S., 218*, and *Cincinnati &c., R. Co.* v. *Bohon*, *200 U. S., 226*, that the liability of a master for the torts of his servant, under the doctrine of *respondeat superior*, is or may be a *joint* liability with that of the servant, is not involved in the present case.

(2) There is no statute of Kentucky which imposes any liability on the lessor company for the death of a person caused by the negligence of its lessee. The Kentucky statute imposes such liability on "the person or persons, company or companies, corporation or corporations, their agents or servants *causing* the same," *i. e.*, the death.

The Kentucky Court of Appeals does not reason out, or try to reason out, that the act of the Maysville and Big Sandy

Railroad Company, in leasing its road to the Chesapeake and Ohio Railway Company, *caused* the death of the intestate.

(3) The sole ground upon which the Kentucky Court of Appeals bases its conclusion that the Maysville and Big Sandy Railroad Company is liable in damages for the death of the intestate is that it has *assumed*, *i. e.*, has agreed, or promised, by accepting the franchises granted to it by its charter, "to pay just damages to any person, injured by any want of care in using the right so granted." "By its acceptance of the franchises conferred by the state the corporation *assumed* the corresponding burdens thereby imposed." As the grant is "of a public right in which everyone of the public is a sharer, so the *promise* is to each one of the public." It is thus reasoned out that the grant by the state of a right to lease is not a release from the liability thus assumed. *McCabe* v. *Maysville & Big Sandy R. Co.*, *23 Ky. L. Rep.*, *2528*. The opinion in that case, as published in *112 Ky.*, *861*, is somewhat different from that as published in the *Kentucky Law Reporter*. The latter is the text of the opinion as corrected on a petition for rehearing, and as certified to this court on the writ of error in that case now pending in this court. The publication of the first opinion (without the corrections) was evidently by a mistake of the reporter.

In short, the argument of the Kentucky court is:—The charter of a railroad company is a *contract*, by the acceptance of which it *assumes* certain duties to the public and to each member of the public; and it is liable for a breach of this

duty, so assumed by it, although the tort which constitutes the breach is committed by its lessee. The ground is the same precisely as that on which the surety on an official bond is liable for the tort of his principal. This liability is based, not upon the idea that the surety commits the tort, either by himself or his servant or agent over whom he exercises control, but solely upon the idea that he has *contracted* to be liable for the tort of his principal.

So that the question now at hand is narrowed to this: Is a cause of action, based alone on a contract to be liable for another's tort, a joint cause of action with one against the tort feasor for the tort?

The case of *Louisville & Nashville R. Co.* v. *Ide*, *114 U. S.*, *52*, was a suit against several parties to a joint contract; and it was held that one of the alleged joint contractors could not remove the suit on the ground of there being a separable controversy as to it.

The case of *Pirie* v. *Tvedt*, *115 U. S.*, *41*, was a suit against several alleged joint tort feasors; and it was held that there was no separable controversy entitling one of the defendants to remove the suit.

The case of *Alabama & Great Southern R. Co.* v. *Thompson*, *200 U. S.*, *218*, was a suit against a master and its servant to recover against them jointly for the tort of the servant. It was held that plaintiff having elected to sue them *jointly*, there was no separable controversy which entitled the master to remove the case to the federal court. It was a suit against two alleged joint tort feasors, and hence within the doctrine of

*Pirie* v. *Tvedt*, *115 U. S.*, *41*, and *Sloane* v. *Anderson*, *117 U. S.*, *275*.

The broad distinction between that case and the present is that there the plaintiff stated in his petition a joint cause of action against the two defendants, whereas, in the present case, plaintiff's petition does not state a joint cause of action against the two defendants. The circumstance that plaintiff has so worded his petition as to indicate that he *thought* he was stating a joint cause of action against the two defendants, does not preclude the inquiry as to whether he did, in fact, state a *joint* cause of action against them.

The present suit is one against the Chesapeake and Ohio Railway Company to recover for a tort committed by it; and also to recover for the same tort against the Maysville and Big Sandy Railroad Company on the ground that it had *leased* its road to the tort feasor. The Kentucky Court of Appeals holds that the petition states a cause of action against the lessor company, on the sole ground that its charter is a contract by which it contracted with each member of the public to pay just damages to any one injured by negligence in the operation of its road.

This court has never decided that a suit against a tort feasor, and also against a third party who had contracted to be liable for the tort, did not involve a separable controversy.

The case of *Iowa Lillooet Gold Mining Co.* v. *Bliss*, *144 Fed.*, *446*, is exactly in point on the question here involved. That was a suit by a corporation against its secretary for a tort committed by him, to-wit: embezzlement of its funds, and against a guaranty company which had executed a bond to

plaintiff agreeing to make good any loss to plaintiff arising from any fraud or dishonesty of the secretary. It was held by the Circuit Court of the United States for the Northern District of Iowa that the causes of action were separable and that the guaranty company being a citizen of a different state from plaintiff was entitled to remove the suit from the state court to the federal court.

The case of *Manufacturers' Commercial Co.* v. *Brown Alaska Co., 148 Fed., 308*, was a suit in the Supreme Court of New York by the holder of promissory notes against the maker and indorser thereof. The indorser (which was the original payee) was a citizen of a different state from the plaintiff, and removed the suit to the United States Circuit Court for the Southern District of New York, and plaintiff moved to remand on the ground that the other defendant, the maker of the notes, was a citizen of the same state as plaintiff. The statute of New York expressly allowed the holder of a promissory note to sue *jointly* the maker and indorser thereof. It was held that the suit was removable on the ground that the cause of action against the indorser is separable from that against the maker, because the liability of each arose from a different contract.

In its opinion the court says:

> "The contract of the maker of the notes involved herein, and his liability thereon, is quite independent of the several contracts of the indorsers, and the contracts and liability of the indorsers are alike distinct one from the other; but it is the policy of the state of New York to permit the holder to avoid a multiplicity of actions by joining causes of action of such a nature in a single action.

There is no joint cause of action against two or more of the parties as regards any contract existing by reason of the note or the endorsements thereon. Causes of action and parties severally liable thereon are joined, but the liability is, as regards the basis thereof, separate. The holder does not charge joint, or joint and several, liability, but distinct liability on entirely separate contracts. The cause of action does not become joint, or joint and several, from the mere point that the plaintiff elects to avail itself of the statutory permission and unite parties in the same action. The plaintiff can not, by such procedure, make joint, or joint and several, what is necessarily several in its essential nature; nor can the plaintiff, by availing itself of the statutory provision, estop any defendant, liable solely upon its independent contract, from removing the action as regards such defendant to the federal court, if the other conditions precedent to such removal be present."

See to same effect: *Sheldon* v. *Keokuk Packet Co., 1 Fed., 795; Beuttel* v. *Chicago Ry. Co., 26 Fed., 52.*

In *Stimson* v. *United Wrapping Co., 156 Fed., 298*, it was held by the Circuit Court of the United States for the Western District of New York that a suit by a vendor of goods against his vendee and against a third person who had assumed payment for the goods in consideration of their transfer to him, presented a separate controversy which entitled said third party to remove the suit to the federal court.

The same point was decided by the Circuit Court of Appeals for the Fourth Circuit in *Mecke* v. *Valley Town Mineral Co., 93 Fed., 697.*

That a suit against a lessor and lessee of a railroad to recover for a tort of the lessee in the operation of its trains, presents a separable controversy which entitles the non-resident lessee to remove it to the federal court, was decided by the Circuit Court of the United States for the Western District of Missouri in *Kelly* v. *Chicago Ry. Co.*, *122 Fed.*, *286;* and by the Circuit Court of the United States for the District of South Carolina in *Willard* v. *Spartanburg R. Co.*, *124 Fed.*, *796;* and by the Circuit Court of the United States for the Northern District of Illinois in *Yeates* v. *Illinois Central R. Co.*, *137 Fed.*, *943;* and by the Circuit Court of the United States for the Eastern District of Illinois in *Curtis* v. *Cleveland R. Co.*, *140 Fed.*, *777*.

In the case of *Kelly* v. *Chicago R. Co.*, *122 Fed.*, *286*, a cause of action against the lessor for the tort of its lessee was given by an express statute, which provided that—

> "a corporation in this state leasing its road to a corporation of another state, * * * shall remain liable as if it operated the road itself."

The court held that this cause of action, so given by statute, was not a joint cause of action with that against the lessee for its negligence, and that the lessee, therefore, could remove from the state to the federal court an action brought against both companies for the negligence of the lessee.

The question presented in the present case is entirely different from what it would have been if the lease in question had been *ultra vires*. In such case the lessor would have been treated as still in possession and control of the leased road. It

would still have legally the *right* of *control*, and the so-called lessee would have been its agent, with no more legal possession than an employe of the lessee company would have. *Arrowsmith* v. *Nashville &c., R. Co., 57 Fed., 165.*

This court in *Fraser* v. *Jennison, 106 U. S., 194*, described, in language that has been often quoted with approval, what *is* a separable controversy within the meaning of the removal statute. It is—

> "a separate and distinct *cause of action* on which a separate and distinct suit might be brought and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different states from those on the other."

That requirement, to the full, exists in the present case. Under the doctrine of the Kentucky Court of Appeals, which holds the lessor company liable for the torts of its lessee on the ground solely that it (the lessor) *assumed* certain duties to the public by the acceptance of its charter, that company could have been sued on that contract obligation and a recovery had without joining its lessee. Its liability does not rest upon the idea that it is a tort feasor at all, much less a *joint* tort feasor with its lessee, or with the servants of its lessee.

*Pomeroy on Code Remedies, section 308*, in discussing when a cause of action is, or may be, *joint*, says:

> "It is not enough that the injured party has on certain grounds a cause of action against one, for the physical tort

done to himself or his property, and has, *on entirely different grounds*, a cause of action against another, *for the same physical tort*. There must be something more than the existence of two separate causes of action for the same act or default, to enable him to join the two parties liable in the single action. This principle is of universal application."

The circumstance that the petition prays for a joint recovery against both defendants does not make the causes of action a *joint cause of action* against them. The cause of action is—

> "different from the remedial right, and from the remedy or relief sought. The remedial right is the *consequence*, the secondary right which springs into being from the breach of the plaintiff's primary right by the defendant's wrong, while the remedy is the consummation or satisfaction of this remedial right." *Pomeroy on Code Remedies, section 454.*

The same learned author says, in *section 456:*

> "If the facts alleged in the pleading show that the plaintiff is possessed of two or more distinct and separate primary rights, each of which has been invaded, or that the defendant has committed two or more distinct and separate wrongs, it follows inevitably, from the foregoing principle, that the plaintiff has united two or more causes of action, although the remedial rights arising from each, and the corresponding reliefs, may be exactly of the same kind and nature."

The circumstance that the laws of a state might allow those two different causes of action to be enforced in one suit can not make them one *joint* cause of action. They are two separate causes of action, even though the laws of the state may allow

them both to be enforced in one lawsuit. *Manufacturers' Commercial Co.* v. *Brown Alaska Co., 148 Fed., 308.*

In *Iowa Lillooet Gold Mining Co.* v. *Bliss, 144 Fed., 456,* it is said:

> "The removal act clearly recognizes that a suit brought in a state court may, consistently with the rules of pleading, rightly embrace several distinct controversies between the plaintiff and different defendants, and, if in such suit there shall be a separable controversy of which the circuit courts of the United States are given original jurisdiction, its plain purpose is to give to the non-resident citizen actually interested in such controversy the right to remove the suit to the proper circuit court of the United States, though a citizen of the same state as the plaintiff or an alien may have been *rightly* made a party defendant to settle and determine other controversies between him and the plaintiff."

It is respectfully submitted that the judgment of the Court of Appeals of Kentucky, in affirming the judgment of the Lewis Circuit Court, is erroneous and should be reversed.

E. L. WORTHINGTON,
*Counsel for Plaintiffs in Error.*

W. H. WADSWORTH,
W. D. COCHRAN,
LEWRIGHT BROWNING,
*Of Counsel.*

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# Supreme Court of the United States

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No. 158

Chesapeake & Ohio Railway Company and
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*v.*

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*Defendant in Error.*

## REPLY BRIEF FOR PLAINTIFFS IN ERROR

## WRIT OF ERROR TO THE COURT OF APPEALS OF KENTUCKY

E. L. WORTHINGTON,
*Counsel for Plaintiffs in Error.*

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*Defendant in Error.*

## REPLY BRIEF FOR PLAINTIFFS IN ERROR

*May it Please the Court:*

In the brief for defendant in error it is argued that the error of the Lewis Circuit Court, in overruling the petition of plaintiffs in error to remove the case after the suit was discontinued against the individual defendants, cannot be considered on this present writ of error from the final judgment of affirmance of the Kentucky Court of Appeals. The point of that contention is that the writ of error should have been directed to the Lewis Circuit Court to review its judgment overruling the motion to remove.

The unsoundness of this contention is effectually settled by numerous decisions of this court. *Great Western Tel. Co.* v. *Burnham, 162 U. S., 339; Missouri Pacific Ry. Co.* v. *Fitzgerald, 160 U. S., 556; Gordon* v. *Longest, 16 Peters, 97; Baltimore & Ohio Ry. Co.* v. *Koontz, 104 U. S., 5; Burlington &c. R. Co.* v. *Dunn, 122 U. S., 513; Cincinnati Street Railway Co.* v. *Snell, 179 U. S., 395.*

The contention that the judgment of the United States Circuit Court remanding the suit, is a bar to the right to remove on the second petition, filed after the suit had been dismissed against the individual defendants, is disposed of by the decision of this court in *Powers* v. *Chesapeake & Ohio Ry. Co., 169 U. S., 92.*

In this case, as in that, the suit was not removable when the first petition for removal was filed. It became removable, for the first time, when the individual defendants were dismissed from it. When the federal court remanded the case, it is fair to presume that it did so for the reason that it was not then a removable case. When a court renders a proper judgment there is no presumption that it did so for an improper reason.

The third contention of defendant in error is based on the assumption that the lease by the Maysville and Big Sandy Railroad Company to the Chesapeake and Ohio Railway Company is *ultra vires.*

The sharp point of the contention is that, in the absence of a showing to the contrary, the presumption is that the Chesapeake and Ohio Railway Company had no power to *accept* the

lease; and that, in order to show that it had such power, it was necessary that it should, in its petition for removal, set out the terms of its Virginia charter, so that a Kentucky court could determine whether such power had been granted to it by the State of Virginia.

This contention is, I submit, unsound.

The ultimate question involved is,—Does the petition of defendant in error state a *joint cause* of *action* against the two plaintiffs in error? This question hinges on the question whether this petition shows that the lease by the Maysville and Big Sandy Railroad Company to the Chesapeake and Ohio Railway Company is *ultra vires* and void. If it does, then it may be conceded that the cause of action is joint. If it does not, then the cause of action against the lessor company is based alone on its *contract* with the public, and that against the lessee is based alone on its tort, and these two causes of action are not joint. What the petition for removal alleges on this subject is immaterial, except as bearing on the question of fraudulent joinder. *Alabama & Great Southern R. Co.* v. *Thompson*, *200 U. S., 218.*

The sole allegation, in the petition of defendant in error, as to this lease is that it was made "without legal authority and without authority or warrant, and same therefore was and is void."

If that is a sufficient allegation that the lease is *ultra vires*, it must be because it sufficiently shows, either that the Maysville and Big Sandy Railroad Company had no power to *make* the lease, or that the Chesapeake and Ohio Railway Company had no power to *accept* the lease. The inquiry would naturally suggest itself,—Which one of those two facts does such an

allegation put in issue? Or, does it put in issue, both? Or, neither?

My contentions are: (1) That this statement in the petition is a statement of a mere legal conclusion, and is not sufficient to put in issue either the power of the lessor company to *make* the lease, or the power of the lessee company to *accept* the lease; and (2) there being no showing in the petition that the lease is *ultra vires*, the *presumption of law* is that it is valid and within the power of both companies.

Upon both of those propositions the opinion of the Court of Appeals of Kentucky in *Jones* v. *Bank of Tennessee*, *8 B. Mon.*, *122*, is decisively in point. That was a suit brought by a Tennessee corporation in the courts of Kentucky, on a bond alleged to have been discounted to it. The defendant pleaded that "plaintiffs had no corporate powers granted to them in their charter, to discount or acquire title to the writing sued on, or to commence or prosecute a suit on it in this State." In deciding that such a plea was not sufficient, the Court of Appeals of Kentucky said:

> "These pleas allege deductions of law instead of facts. If the provisions of the charter conferred no such authority, it could only be shown legally, by setting forth the charter itself. The law would then determine its effect and the extent of the powers conferred by it. The pleas contain merely the conclusions of the defendants in relation to the extent of these powers, and assume the decision of a question of law, instead of averring matters of fact."

This court, in *Ohio & Mississippi Ry. Co.* v. *McCarthey*, *96 U. S.*, *258*, said:

> "When a contract is not on its face necessarily beyond the scope of the power of the corporation by which it was

made, it will, in the absence of proof to the contrary, be presumed to be valid. Corporations are presumed to contract within their powers."

In *Southern Express Co.* v. *Western North Carolina R. Co.*, *99 U. S., 191*, where the point was made that it was not shown that either the plaintiff, the express company, or the defendant, the railway company, had power to make the contract sued on, this court, in overruling the objection, said:

> "The contract of a corporation is presumed to be *infra vires*, until the contrary is made to appear. * * * Adequate capacity on the part of the railway company to make the contract is to be presumed in like manner."

Lord Wensleydale, in his opinion in the House of Lords in the case of *Scottish Northeastern Ry. Co.* v. *Stewart*, *3 Macqueen, 415*, speaking of the contracts of a corporation, says:

> "*Prima facie* all its contracts are valid, and it lies on those who impeach any contract to make out that it is avoided."

Judge Thompson, in *Volume 5* of his work on *Corporations*, *Section 5967*, thus states the well settled doctrine on this subject:

> "The *presumption of right acting* extends to private corporations in such a sense that they are always presumed to act within their granted powers until the contrary is made to appear. So that, in general, the *burden* of showing that a contract made, or an act done, by such a corporation was *ultra vires*, is upon him who alleges that fact as the foundation of his action or defense. This presumption operates in several ways. If the powers possessed by the particular corporation do not appear at all, and are not judicially noticed by the court, then it operates within cer-

tain limits, to carry with it the general presumption that the act or contract which is challenged was within its powers."

In *Volume 6, Section 7883*, of the same work, it is said:

"When the validity of a contract, made by a corporation in a state other than the state of its creation, is drawn in question, it will not be presumed, in the absence of proof, that there is any restriction in its charter, or in the laws of the state of its creation, prohibiting it from making such contracts in a foreign jurisdiction."

From these considerations, these conclusions result: If the courts of Kentucky did not take judicial notice of the charter of the Maysville and Big Sandy Railroad Company, then the presumption of law would be that it had the power to make the lease in question. In fact, however, the courts of Kentucky do take judicial notice of its charter by virtue of *Section 1624, Kentucky Statutes*, which reads: "The several courts of this Commonwealth shall take judicial notice of all acts and resolutions of the General Assembly." *Section 119 of the Kentucky Code* does not *require* private statutes to be pleaded; it only *permits* them to be pleaded. *Town of Central Covington* v. *Weighaus, 44 S. W. Rep., 985.*

The Court of Appeals of Kentucky have construed the charter of the Maysville and Big Sandy Railroad Company to give to it the power to make the lease in question. *McCabe* v. *Maysville & Big Sandy R. Co., 23 Ky. L. Rep., 2328.*

The Chesapeake and Ohio Railway Company being a Virginia corporation, the courts of Kentucky do not take judicial notice of its charter powers; therefore, it being alleged, in effect, that it *accepted* the lease, the presumption is that it had

power to so do; and that presumption is not overthrown by the allegations in the petition of defendant in error that said lease was "without legal authority, and without authority or warrant, and same therefore was and is void." The decision of the Court of Appeals of Kentucky, in *Jones* v. *Bank of Tennessee, 8 B. Mon., 122,* is conclusive of that question.

The sole question left in the case is,—Is the cause of action stated in the petition of defendant in error, (which cause of action consists of the allegations, (1) that the death of Nancy J. Wilson was caused by the negligence of the employes of the Chesapeake and Ohio Railway Company in operating its train; and (2) that the Maysville and Big Sandy Railroad Company owns the road over which the train was operated, and had leased it to the Chesapeake and Ohio Railway Company,) a *joint* cause of action against the Maysville and Big Sandy Railroad Company and the Chesapeake and Ohio Railway Company? If it is so, it is not because this court must presume that the lease of the road by the Maysville and Big Sandy Railroad Company to the Chesapeake and Ohio Railway Company is void for the reason that the Chesapeake and Ohio Railway Company had no power by its charter to *accept* this lease, but because the Maysville and Big Sandy Railroad Company, by accepting its charter from the State of Kentucky, *contracted* to pay just damages to any one injured by negligence in the operation of its road, and this cause of action, based on this contract duty, is a *joint* cause of action with the one alleged against the Chesapeake and Ohio Railway Company for a *tort* committed by it.

The Court of Appeals of Kentucky have, in the case of *McCabe* v. *Maysville & Big Sandy R. Co.*, *23 Ky. L. Rep.*, *2328*, and in the several later cases cited in the brief of counsel for defendant in error, decided that a lessor of a railroad is liable for the torts of its lessee in the operation of the road, even though the lease was authorized by statute, unless some statute exempted it from liability therefor. This is not a decision construing a statute. It is a decision as to what the sound rule of law is in the absence of a statute changing it. In none of those cases did the Kentucky Court of Appeals put the liability of the lessor for the torts of its lessee upon the ground that the lessee was the *servant* of the lessor, or under the *control* of the lessor, but on the sole ground that the lessor had *assumed* such liability by the acceptance of its charter. There is nothing in the opinion in that McCabe case to warrant the statement made on page 25 of the brief of defendant in error that the court rested its conclusion that the lessor company was liable for the torts of its lessee upon the ground "that the lessor still retains paramount authority as *master* and the lessee is merely an operating agent or *servant*."

Whether a suit against A for a tort committed by him, and against B on his contract to be liable for A's tort, involves a separable controversy must, in its last analysis, depend upon the proper construction of the Act of Congress authorizing removals. Is there in such a suit a controversy which is wholly between the plaintiff and A, and which can be fully determined as between them? That question necessarily involves the construction of the Act of Congress. The circumstance that the laws of a state might allow A and B, in the case put, to be sued together in one action, that is, might allow those two causes of

action to be joined in one suit, could not foreclose the inquiry whether in such a suit there is a controversy which is wholly between citizens of different states, and which can be fully determined as between them, within the meaning of *Section 2 of the Act of 1887–88.*

It is respectfully submitted that the judgment of the Court of Appeals of Kentucky, in affirming the judgment of the Lewis Circuit Court, is erroneous and should be reversed.

E. L. WORTHINGTON,
*Counsel for Plaintiffs in Error.*

W. D. COCHRAN,
LEWRIGHT BROWNING,
*Of Counsel.*

# Supreme Court of the United States

OCTOBER TERM, 1908

No. 158

Chesapeake & Ohio Railway Company and
Maysville & Big Sandy Railroad Company,
*Plaintiffs in Error,*

*v.*

J. W. McDonald, Administrator
of Nancy J. Wilson, Deceased,
*Defendant in Error.*

## WRIT OF ERROR TO THE COURT OF APPEALS OF KENTUCKY

## SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR

*May it Please the Court:*

Assuming that this case was a removable one when the second petition for removal was filed, then the jurisdiction of the state court was divested by the presentation of the petition and bond to that court. The order of the state court overruling

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## WRIT OF ERROR TO THE COURT OF APPEALS OF KENTUCKY

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*May it Please the Court:*

Assuming that this case was a removable one when the second petition for removal was filed, then the jurisdiction of the state court was divested by the presentation of the petition and bond to that court. The order of the state court overruling

the petition to remove was void. It continued void. At no time did it bind the court that made it, or any other court. It did not become valid after two years, even if it be true that the Court of Appeals of Kentucky could not have entertained an appeal from it after two years.

The final judgment in the case awarding damages to plaintiff was also void. That judgment did not become valid because it was rendered more than two years after the refusal to remove the case. That final judgment was the only final judgment that was appealed from. If that judgment is void, the Court of Appeals of Kentucky had jurisdiction to reverse it, and it was the duty of that court to reverse it. An order that a law of the United States makes void can not take away the power and the duty of the Court of Appeals of Kentucky to disregard it. That court had jurisdiction of the appeal; and no void order of the lower court could divest or narrow its jurisdiction.

If it be suggested that there was no exception taken to this final judgment, I reply that the Court of Appeals of Kentucky has decided in numerous cases that it is not necessary, under the Kentucky Code, to object or except to a final judgment in order to appeal from it. *Talbott* v. *Campbell*, *67 S. W. Rep., 53; 23 Ky. Law Rep., 2198; Coffman* v. *Wilson*, *2 Metcalfe, 542.*

The real ground of complaint, and the only ground of complaint, on the part of plaintiffs in error on this present writ of error, is, that the highest court of Kentucky, by affirming the judgment appealed from, sustained the validity of a judgment

of the circuit court of Lewis County, Kentucky, which was repugnant to a law of the United States, to-wit, the provision in the Removal Act which required the state court "to proceed no further in such suit."

This court held in *Mutual Life Insurance Company* v. *McGrew*, *188 U. S.*, *291*, that where the highest court of a state affirms a judgment of a state court, which failed to give effect to a judgment of a court of the United States, it decides against the validity of an authority exercised under the United States; that such a case, therefore, is embraced within the *first* of the three classes of cases mentioned in *Section 709*, *Rev. St.*, *U. S.* It follows that when the highest court of a state sustains the validity of a judgment of a lower state court where its validity was drawn in question on account of its being repugnant to some law of the United States, it sustains the *validity* of an *authority* exercised under a *state*. Such a case is therefore embraced within the *second* of the three classes of cases mentioned in *Section 709*, *Rev. St.*, *U. S.*

Such is this present case. It is a case belonging to that *second class*, and therefore the particular right claimed is not required by Section 709 to be specially set up and claimed. That requirement applies, not to cases embraced in the *first* and *second* classes mentioned in Section 709, but to those embraced in the *third* class only. *Yazoo & Mississippi Valley R. R. Co.* v. *Adams*, *180 U. S.*, *1*; *Columbia Water Power Co.* v. *Columbia Electric St. Ry. Co.*, *172 U. S.*, *475*.

Aside from this, I maintain that the validity of the judgment of the Lewis Circuit Court was specially set up and claimed in the Court of Appeals of Kentucky, in the only mode by which its validity could be set up and claimed in that court under the laws of Kentucky; to-wit, by taking an appeal from it in the manner provided by the laws of Kentucky. So that, if it should be held that the present case is embraced in the *third* class mentioned in Section 709, and not in the *second* class, still the question of the removal of the cause from the state to the federal court was properly presented to the Court of Appeals of Kentucky, and is now presented to this court.

There is an allegation in the original petition of the plaintiff (now defendant in error), that plaintiff in error, The Maysville & Big Sandy Railroad Company (the lessor), negligently failed to have any watchman or safety gates, or other device or apparatus, at the crossing where the accident took place, to warn travelers of the approach of the train. It is alleged in that petition that all the other acts of negligence charged were done by and through the employes of the plaintiff in error, The Chesapeake & Ohio Railway Company (the lessee.) This allegation states no cause of action against the Maysville & Big Sandy Railroad Company. No facts are stated in the petition to show any *duty* upon the part of the lessor to provide watchmen or safety gates at the highway crossing. Moreover, the petition affirmatively shows that no such duty existed, for it shows that the crossing at which the intestate was killed was a crossing in the country, on a farm,—not in any city or town; and, under the law of Kentucky, there is no duty on the part of any railroad company to have watchmen or safety gates at

an ordinary public crossing in the country. The law of Kentucky on this subject is embraced in a quotation from the opinion in *Central Passenger Company* v. *Kuhn*, *86 Ky.*, *589*, contained in the opinion of this court in *Grand Trunk R. R. Co.* v. *Ives*, *144 U. S.*, *408*, where the same doctrine is approved.

So, it results that the only cause of action stated against the lessor company, on the face of plaintiff's petition, is that it *owned* the road on which the accident occurred, and that the accident was caused by the negligence of some persons in operating a train on its road.

For the purpose of this hearing, I concede that the decision of the Court of Appeals of Kentucky that the lessor company is liable for such an injury, concludes that matter in determining the right of removal. I concede further, that the decision of the Court of Appeals of Kentucky that the lessor and lessee railroad company may both be made defendants to one lawsuit and a joint judgment rendered against them, is conclusive of that matter. I concede further, that the ground upon which the Court of Appeals of Kentucky bases its conclusion that the above two facts give a right of action against the owner of the road, in other words, the *nature* of the cause of action against the lessor, will be accepted by this court in determining whether there was a right of removal. But behind all those questions remains the question,—Are there *two causes of action* stated in the petition, or *one* only? Is the cause of action against the owner of the road, based upon its "promise to the public, and to each member of the public," to pay just damages to any one injured by negligence in the operation of its

road, the same cause of action as that against the tort feasor whose negligence caused the injury? That question, I submit, is a question involving the construction of the Removal Act. It involves the inquiry, what is the meaning of the words in the Removal Act—"controversy wholly between citizens of different states?" This court has several times defined the word "controversy" to mean "cause of action." So that the ultimate inquiry is, what is the meaning of the term "cause of action?" If it means, as the books all say it means, the *wrong done* by the defendant to plaintiff's right, and does not include the *remedial* right which grows out of and springs from that wrong, then I submit, that a cause of action against the owner of the road to recover for the negligence of a lessee, based upon a duty put upon it by its charter, to pay just damages to any one injured by negligence in the operation of the road, is not a joint cause of action with one against its lessee for a *tort* committed by it.

This question, as to the right of removal on the ground of separable controversy, is discussed with great clearness by Judge Shiras in his opinion in the case of *Deere, Wells & Co.* v. *Chicago, M. & St. P. Ry. Co., 85 Fed. Rep., 876.* He says:

> "The mere fact that in form the petition contains but one count is not decisive of the question; for if, upon due examination, it appears that the plaintiff, without setting the same forth in separate counts, has included in the one petition statements of facts which show that it is sought to hold one or more of the defendants liable upon a cause or ground of action which is different and separable from

that relied on against the other defendants, the court will be justified in holding that the case does in fact involve more than one controversy. * * * If, upon the face of the petition, it appears that the plaintiff has joined therein two controversies, separate and distinct, and that one of them is between citizens of different states, and involves the requisite amount, then the right of removal is shown to exist, no matter whether the two actions could be properly joined in one suit or not. A misjoinder of parties as defendants to one cause of action does not give a right of removal under the federal statute. A misjoinder of several causes of action in one suit is not a ground of removal. The fact that in one suit are embraced two or more several controversies will justify a removal, provided one of the controversies is between citizens of different states, and it includes the requisite amount; and the right of removal in such case is not affected either way by the question whether the severable controversies actually included in the suit are properly so included or not."

The same idea is expressed by Judge Amidon, in the case of *Helms* v. *Northern Pac. Ry. Co.*, *120 Fed. Rep.*, *395*, thus:

"It is important to get clearly in mind the precise question that is presented on this motion to remand. Much is said in the opinions of misjoinder of defendants, and misjoinder of causes of action. These matters can have only an indirect bearing upon the question now under consideration. If the cause of action is single, the misjoinder of a defendant presents no ground for removal in his favor. There is no separable controversy as to him. His objection goes to the merits of the case, and his only redress is to defeat a recovery in the state court. On the other hand, if there is a misjoinder of two distinct causes of action, the fact of misjoinder is wholly immaterial on

the question of the right of removal. A plaintiff who improperly unites two causes of action, one of which presents a controversy justifying removal, subjects himself to the liability of having the entire cause removed into the federal court. Whether, in fact, the causes of action are properly or improperly joined goes to the merits, and a defendant who has the right to remove the cause has also the right to have this question, like any other arising in the case, determined by the federal court. For this reason all these questions as to the misjoinder of parties or causes of action are immaterial, except as they throw light upon the primary question whether there are or are not two causes of action presented by the complaint."

These quotations express really the same idea that is expressed by this court in the case of *Geer* v. *Mathieson Alkali Works*, *190 U. S.*, *428*, where Mr. Justice McKenna, delivering the opinion, says:

"A suit may, consistently with the rules of the pleading, embrace several distinct controversies. * * * And when two or more causes of action are united in one suit, there can be a removal of the whole suit on the petition of one or more of the plaintiffs or defendants (now only the defendants) interested in the controversy which, if it had been sued on alone, would be removable."

A reversal is respectfully prayed.

E. L. WORTHINGTON,
*Counsel for Plaintiffs in Error.*

W. D. COCHRAN,
LEWRIGHT BROWNING,
*Of Counsel.*

# Supreme Court of the United States

OCTOBER TERM, 1908

No. 158

The Chesapeake & Ohio Railway Company and the Maysville & Big Sandy Railroad Company - - *Plaintiffs in Error,*

*v.*

J. W. McDonald, Administrator of Nancy J. Wilson, Deceased - *Defendant in Error.*

## BRIEF FOR DEFENDANT IN ERROR

### STATEMENT

*May it Please the Court:*

The Maysville and Big Sandy Railroad Company, a corporation created by a special act of the Legislature of Kentucky, some time prior to the death of Nancy J. Wilson in 1899, undertook to contract with the Chesapeake and Ohio Railway Company, a Virginia corporation, to receive and operate its line of railroad, extending from Covington, Ky., along the Ohio River through Lewis County to Ashland, Ky.

The charter of the Maysville and Big Sandy Railroad Company did not authorize it to sell or transfer either its franchises

or roadbed, but merely conferred upon the corporation the narrow and limited power to contract *for the operation of its road.*

Though the Maysville and Big Sandy Railroad Company undertook to contract with the Chesapeake and Ohio Railway Company *for the operation of its road;* yet, whatever may have been the intention of the parties, the domestic corporation was not authorized to cast off its duties to the public, nor was the foreign corporation authorized to make the alleged lease.

On September 2, 1899, Nancy J. Wilson, while upon her farm crossing in Lewis County, Kentucky, was run against and killed by one of the trains operated by the Chesapeake and Ohio Railway Company. Thereafter, on March 23, 1900, defendant in error brought a suit in the Lewis Circuit Court against the Maysville and Big Sandy Railroad Company and the Chesapeake and Ohio Railway Company and certain of its resident employes, jointly, for $10,000.00 damages for the wrongful death of his intestate.

On May 29, 1900, the Chesapeake and Ohio Railway Company filed a petition for removal of the cause to the United States Circuit Court for the District of Kentucky, upon the ground of diversity of citizenship; and thereupon obtained an order of removal to said court. On September 3, 1902, the cause having been remanded to the Lewis Circuit Court, the order of the United States Circuit Court for the Eastern District of Kentucky was noted of record therein.

Never having been able to get process served on the employes of the Chesapeake and Ohio Railway Company, by reason of their constant employment on its trains, defendant in

error, on January 19, 1903, moved the Lewis Circuit Court to dismiss, without prejudice, this action as to them, thus leaving the action to remain against the foreign and domestic corporations; which motion was sustained.

Thereupon, the Chesapeake and Ohio Railway Company, on January 21, 1903, filed a second petition for removal, and, again, upon the ground of diversity of citizenship. But the Lewis Circuit Court this time overruled the foreign corporation's motion, and refused to transfer the cause a second time upon the same ground. Although this was a final order, no appeal was ever prosecuted therefrom.

Thereafter, on May 19, 1904, the Lewis Circuit Court, upon the trial of the cause, directed a verdict for plaintiffs in error; but its judgment on the verdict was, on April 25, 1905, reversed by the Kentucky Court of Appeals. The second trial of the cause in the Lewis Circuit Court was had on September 27, 1906, and resulted in a verdict and judgment for defendant in error. From this judgment, and this only, an appeal was taken to the Kentucky Court of Appeals, which judgment, affirming with damages the judgment of the lower court, is now under review in this court on writ of error.

The judgment in question should be affirmed with damages and writ of error dismissed with costs for the following reasons:

# ARGUMENT

## I.

## THIS COURT HAS NOT JURISDICTION OF THE WRIT OF ERROR.

Before taking up the merits of this case it seems desirable to ask the court to consider the question of jurisdiction.

It is not believed that this court has jurisdiction of the writ of error so as to permit a review of the judgment of the Court of Appeals of the State of Kentucky, affirming the judgment of the Lewis Circuit Court, for the reason that the judgment was affirmed on non-federal grounds, and that the writ of error should have been directed to the Lewis Circuit Court.

### (*A*)

#### THE CASE PRESENTS NO FEDERAL QUESTION.

It appears from paragraph 21 of the record, that the order overruling the motion to remove this cause to the United States Circuit Court, was entered on January 21, 1903. This was a final order.

In the case of Ill. Cent. R. R. Co. *v.* Jones's Admr., 80 S. W. Rep., 485, it is said:

> "The proper practice then is for the other party, if dissatisfied, to controvert in the federal court the facts alleged in the petition for removal, and have the case remanded if improperly removed. If the state court orders this removal upon the insufficient petition, the party aggrieved may also prosecute an appeal at once to the state appellate court, to have the order reviewed."

It also appears from the summons on appeal in paragraph 243, and the statement in paragraph 245, that more than two years after the order was entered overruling the motion to remove the case, an appeal was prosecuted to the Kentucky Court of Appeals *solely* from the judgment rendered in the Lewis Circuit Court on the 27th day of September, 1906.

Section 745 of our Civil Code of Practice provides that in a case like this, "An appeal shall not be granted except within two years next after the right to appeal first accrued." The time for an appeal from the order overruling the motion to remove the cause, having expired by limitation, and no appeal having been taken therefrom, it was clearly impossible for the Kentucky Court of Appeals to consider whether the Chesapeake and Ohio Railway Company had been deprived of its right under the Constitution and statutes of the United States or not, when it had under consideration the judgment appealed from, rendered on September 27, 1906.

In the case of M. & B. S. R. R. Co. *v.* Willis, 104 S. W. Rep., 1018, it is said:

> "It is further insisted that it was error not to grant the request of appellant to remove the action to the federal court. This motion was based upon the ground that the original petition did not state a good cause of action either against the Chesapeake and Ohio Railway Company, which is a foreign corporation, or the resident defendant, the Maysville and Big Sandy Railroad Company. * * * The action of the lower court refusing to transfer the action was made and entered in July, 1903, and it is now too late to raise any question as to the regularity of this ruling. In fact, this appeal is prosecuted *alone* from the judgment rendered in October, 1906, and

under no state of case could this court review the error of the character complained of in 1903."

Therefore, there can be no doubt that the judgment under review was rendered on a ground independent of the alleged federal right; and that it discloses nothing that concerns this court.

In the case of Nashville, N. & St. L. Ry. Co. *v.* Taylor, 86 Fed. Rep., 175, it is said:

> "With respect to the appellate jurisdiction of the Supreme Court of the United States over final judgments of the highest court of the state on writ of error, it is to be remarked that the re-examination of such judgment extends only to the federal question, and not to other issues in the case of a non-federal character, and the question must be one of law, and not of fact. Murdock *v.* City of Memphis, 20 Wall., 590; Dower *v.* Richards, 151 U. S., 658; 14 Sup. Ct., 452; Union Nat. Bank of Chicago *v.* Louisville, N. A. & C. R. R. Co., 163 U. S., 329; 16 Sup. Ct., 1039. Consequently, if the judgment of the state court was rested on grounds independent of the federal question sufficient in themselves to sustain the judgment, the writ of error will be dismissed. Hammond *v.* Johnston, 142 U. S., 73; 12 Supt. Ct., 141; Haley *v.* Breeze, 144 U. S., 130; 12 Sup. Ct., 836."

In the case of Tripp *v.* Santa Rosa Street Ry. Co., etc., 144 U. S., 126, it is said:

> "The decision of the Supreme Court of California, that as no appeal was prosecuted from the final judgments, the order denying the application to remove, was not open to review, and its judgment thereupon dismissing the appeal from the orders refusing to set aside the judgments of the court below rest upon grounds of state procedure with which it is not our province to interfere."

(*B*)

THE WRIT OF ERROR, IF TO ANY, SHOULD HAVE BEEN DIRECTED TO THE LEWIS CIRCUIT COURT.

The Legislature of Kentucky having seen fit to limit time in which the Court of Appeals could exercise a revisory power over the order of the Lewis Circuit Court overruling motion to remove the cause, it follows, after an expiration of the time when its order became final and without appeal, that the Lewis Circuit Court is, for this case, the highest court in which a decision could be had for re-examination in this court.

In the case of Kentucky *v.* Powers, 201 U. S., 37, it is said:

> "If such be the law of Kentucky, as declared by the statutes and by the court of appeals of that Commonwealth, then, after the case is disposed of in that court by final judgment, in respect of the matters of which, under the local law, it may take cognizance, a writ of error can run from this court *to the trial court* as the highest court of Kentucky *in which a decision of the federal question could be had;* and this court, in that event, can exercise such jurisdiction in the case as may be necessary to vindicate any right, privilege, or immunity specially set up or claimed under the Constitution and laws of the United States, and in respect of which the decision of the trial court is made final by the local law; that is, it may re-examine the final judgment of the trial court so far as it involved and denied the federal right, privilege, or immunity asserted."

In the case of Western Union Telegraph Co. *v.* Hughes, 203 U. S., 505, it is said:

> "It is immaterial that the supreme court of appeals was vested by the state constitution with appellate juris-

diction in all cases involving the constitutionality of a law as being repugnant to the constitution of Virginia or of the United States, or that, in the opinion delivered by the court, it discusses the federal question and declared it to be without merit. The fact is undoubted that the writ of error was dismissed solely and expressly because of a want of jurisdiction, and the effect of the formal entry, adjudging that the court was without jurisdiction to pass upon the questions presented by the writ of error, *cannot be different from what it would have been had the court not given expression to its views in a written opinion.* The necessary result of the ruling that the court had not jurisdiction of the writ of error was to determine that the trial court was the final court, where the questions presented by the writ could be decided; and, hence, the writ of error should have been directed to that court. Missouri, K. & T. R. R. Co. *v.* Elliott, 184 U. S., 530, 539; 46 L. ed., 673, 678; 22 Sup. Ct. Rep., 446."

But if the court should be of the opinion that it has jurisdiction, then we contend that—

## II.

## THE LEWIS CIRCUIT COURT PROPERLY REFUSED TO TRANSFER THE CAUSE A SECOND TIME ON THE GROUND OF DIVERSITY OF CITIZENSHIP.

The record does not contain the first petition for removal, nor the opinion of the United States Circuit Court for the District of Kentucky, remanding the cause to the Lewis Circuit Court. But the second petition for removal alleges:

"Which opinion held that the joinder by plaintiffs, of the employe defendants in said original suit, had the effect

to prevent your petitioner from removing the same to the said Circuit Court of the United States."

There is no allegation, however, that the opinion held that the joinder of the lessor domestic corporation with the lessee foreign corporation, did *not* have the effect to prevent a removal of the cause. The joinder of the two corporations was as much in issue for the determination of the court, as the joinder of the employes. The presumption, therefore, exists that the cause was remanded because of the joinder of the two corporations as well. Indeed, if it had been otherwise, petitioner could and would have taken a transcript of the record to the United States Circuit Court and enjoined defendant in error from proceeding further in the state court; or else have prosecuted an appeal from the final order to the Kentucky Court of Appeals.

In the case of Sturges *v.* Carter, 114 U. S., 523, it is said:

> "Under the circumstances, we must presume that the judgment of the circuit court, in respect to its amount, as well as in other respects, was right, *unless the contrary is shown*. Ventress *v.* Smith, 10 Pet., 161; Townsend *v.* Jamison, 7 How., 714; The Ship Potomac, 2 Black, 581. (67 U. S., bk. 17; L. ed., 263.)

In the case of Jones *v.* Grover & Baker Sewing Machine Co., 97 U. S., 303, it is said:

> "We can only reverse the judgment for error actually appearing. Every presumption is in favor of the correctness of the ruling below, and until we know from the record what the paper offered in evidence was, we can not say that the court improperly excluded it."

In the case of Merryman *v.* Bourne, 76 U. S., 603, it is said:

"Error is not to be presumed. It must be affirmatively shown. Doubts are to be resolved in favor of the judgment rather than against it."

In the case of Boley *v.* Griswold, 87 U. S., 520, it is said:

"In a court of error every presumption is in favor of the validity of the judgment brought under consideration. Error must appear affirmatively before there can be a reversal."

In the case of Gould *v.* Evansville and C. R. R. Co., 91 U. S., it is said:

"Where the parties and the cause of action are the same, the *prima facie* presumption is that the questions presented for decision were the same, unless it appears that the merits of the controversy were not involved in the issue; the rule in such a case being, *that where every objection urged in the second suit was open to the party, within the legitimate scope of the pleadings, in the first suit*, and *might have been* presented in that trial, the matter must be considered as having passed in *rem judicatam*, and the former judgment in such a case is conclusive between the parties. Outram *v.* Morewood, 3 East., 358; Greatheard *v.* Bromley, 7 T. T., 452.

"Except in special cases, the plea of *res judicata* applies not only to points upon which the court was actually required to form an opinion and pronounce judgment, *but to every point which properly belonged to the subject of the allegation, and which the parties, exercising reasonable diligence, might have brought forward at the time.* 2 Taylor Ev., Sec. 1513; Henderson *v.* Henderson, 3 Hare, 115; Stafford *v.* Clark, 2 Bing., 382; Miller *v.* Covert, 1 Wend., 487; Bagot *v.* Williams, 3 B. & C., 241; Roberts *v.* Heim, 27 Ala., 678."

Since the presumption exists that the United States Circuit Court for the District of Kentucky passed upon the sufficiency of the joinder of these two corporations—

> "The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact by deciding it. Ex-parte Watkins, 3 Pet., 203."

In the case of Railway Co. *v.* McLean, 108 U. S., 212, it is said:

> "When the circuit court first remanded the cause, the order to that effect not being superseded, the state court was re-invested with jurisdiction, which could not be defeated by another removal upon the *same ground*, and by the *same party*."

In the case of Johnston *v.* Donvan, etc., 30 Fed Rep., 395, it is said:

> "This cause was removed from the state court to this court, on the ground that the parties were citizens of different states, by the defendants. On motion of the plaintiff it was remanded because the petition did not set forth the diverse citizenship of the parties at the commencement of the suit as well as at the time of removal. The defendants have now removed the cause again on the same ground. *The plaintiff has moved to remand again, because, as he claims, a second removal on the same grounds is not allowable.* The defendants insist that the former petition was so defective that it did not really effect a removal, and that, therefore, this is the only removal, and not a second removal. The former petition did, however, bring the cause into this court, and within its jurisdiction, so that a motion to remand was necessary. If the

former motion to remand had not been made this court would have properly retained the case. Davies *v.* Lathrop, 13 Fed. Rep., 565; Edwards *v.* Connecticut Mut. Life Ins. Co., 20 Fed. Rep., 452. The former motion to remand was therefore properly before this court, and its decision upon it was conclusive except upon appeal. The defendants' right of removal was involved upon such proceedings as the defendants chose to take that brought it in question. *That right was adjudicated and settled, and could not again be brought in question upon new proceedings.* Railway Co. *v.* McLean, 108 U. S., 212; 2 Sup. Ct. Rep., 498. As the defendants had no right to try that right over again, this second removal was improper, and this motion to remand must be granted."

To the same effect is Smith *v.* Travelers Ins. Co., 73 Fed. Rep., 513.

## III.

## THE PETITION FOR REMOVAL DID NOT STATE FACTS SUFFICIENT TO DIVEST THE LEWIS CIRCUIT COURT OF JURISDICTION.

(*a*)

The petition did not state facts to show that the petitioner, the Chesapeake and Ohio Railway Company, a corporation of Virginia, had power or authority to make the contract, or to receive the property of the Maysville and Big Sandy Railroad Company under the alleged lease. The petitioner simply stated its conclusion, that it had such authority. Encyc. of Pleading and Practice, Vol. 12, page 1035; Jones *v.* Tennessee Bank, 8 B. M. (Ky.), 124. Whereas it was necessary

that the law of Virginia should be plead conferring such authority, if any existed.

In the case of Roots *v.* Merriwether, 8 Bush., 401, it is said:

> "The law of another state when depended upon in a court of Kentucky, is nothing but a fact, must be pleaded, as any other fact, with sufficient distinctness, that the court upon a statement of facts may judge of what is the effect of the law.
>
> "In this instance the court is required, if the plea is held good, to take the plaintiff's conclusion or opinion as a fact, and no fact is alleged upon which the court can have an opinion of its own as to the effect of the law."

To the same effect is Encyc. of Pleading and Practice, Vol. 12, 1041.

Inasmuch as such contract is not among the ordinary powers of a railroad company, it can not be presumed, in the absence of any averment of facts, that the Chesapeake and Ohio Railway Company had authority to make a contract to receive and operate the road and franchises of the Maysville and Big Sandy Railroad Company.

In the case of Pennsylvania R. R. Co. *v.* St. Louis, etc., R. R. Co., 118 U. S., 290, it is said:

> "We think it may be stated, as the just result of these cases and on sound principle, that, unless specially authorized by its charter or aided by some other legislative action, a railroad company can not by lease or any other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers; *nor can any other railroad company without similar authority make a*

*contract to receive and operate such road, franchises and property of the first corporation;* and that such a contract is not among the ordinary powers of a railroad company; and is not to be presumed from the usual grant of powers in a railroad charter."

In the case of McCormick *v.* Market National Bank, 165 U. S., 550, it is said:

> "It is settled by a long series of decisions of this court, that a lease of a railroad by one railroad corporation to another, which is beyond the corporate powers of either, is unlawful and void, and cannot be made good by ratification or estoppel, so as to sustain an action upon the lease; that this is so, not only when the lease is *ultra vires* of the lessor corporation, and therefore open to the objection of disabling it from performing those duties to the public, its performance of which was the consideration upon which it received its charter from the state, *but even if the lease is ultra vires of the lessee corporation only*, and therefore not open to that particular objection. Thomas *v.* West Jersey R. R. Co.; Pennsylvania R. R. Co. *v.* St. Louis, A. & T. H. R. R. Co.; Oregon R. R. & Nav. Co. *v.* Oregonian R. R. Co., and Central Transp. Co. *v.* Pullman Palace Car Co., above cited; St. Louis, V. & T. H. R. R. Co. *v.* Terre Haute & I. R. R. Co., 145 U. S., 393, 404, (36: 748, 753.)"

Since the Chesapeake and Ohio Railway Company had no authority to make a contract to receive and operate the road, franchises and property of the Maysville and Big Sandy Railroad Company, the latter continued liable for the torts of its lessee affecting the public; the former being regarded simply as agent of the latter in operating the road. Arrowsmith *v.* Nashville & D. R. R. Co., 57 Fed. Rep., 171; L. & N.

R. R. Co. *v.* Breedin's Admr., 111 Ky., 729; Hukill *v.* Maysville & Big Sandy R. R. Co., 72 Fed. Rep., 752.

(*b*)

The petition did not state the title of the act of the Legislature incorporating the Maysville and Big Sandy Railroad Company, nor the day on which it became a law. Section 119 of our Civil Code of Practice provides:

> "In pleading a private statute, it shall be sufficient to refer to it by stating its title and the day on which it became a law."

The petitioner only alleged its conclusion as to the contents of this private statute, which were that the Maysville and Big Sandy Railroad Company had the power to transfer to the petitioner by *lease* the railroad. Nichols *v.* Bardwell Lodge, 105 Ky., 168; Rudd *v.* Deposit Bank, 105 Ky., 443; Gaertner *v.* Lou. Stone Co., 114 Ky., 160.

(*c*)

The petition did not state the contents of the alleged contract of lease, nor was a *copy* thereof *filed*. The *conclusion* was that the lease gave the Chesapeake and Ohio Railway Company a dominion over the road, and that under the same it operated the road. It admitted that the Maysville and Big Sandy Railroad Company is and was the *owner* of the road; that it still maintains its corporate organization and existence, but, instead of operating the road directly, has bargained with the Chesapeake and Ohio Railway Company to run it presumably for compensation, as the terms of the lease are not stated in the petition for removal. Encyc. of Pleading and Practice,

Vol. 12, 1038; Collins *v.* Blackburn, 14 B. M., 252; Riggs *v.* Maltby, 2 Met., 88; Huffaker *v.* Nat. Bank, 12 Bush, 287.

In the case of Illinois Cent. R. R. Co. *v.* Sheegog's Admr., 103 S. W. Rep., 326, the Kentucky Court of Appeals, under our Code of Practice, held a similar petition for removal defective. So also has this court in the case of Gold-Washing & Water Co. *v.* Keyes, 96 U. S., 199, said:

> "For the purpose of the transfer of a cause, the petition for removal, which the statute requires, performs the office of pleading. * * * It should, therefore, set forth the *essential* facts *not otherwise appearing in the case*, which the statute has made conditions precedent to the change of jurisdiction. If it fails in this, *it is defective in substance*, and must be treated accordingly. * * * The office of pleading is to state facts, *not conclusions of law*. It is the duty of the *court* to declare the conclusions, and of the *parties* to state the *premises*."

In the case of Alabama *v.* Burr, 115 U. S., 413, it is said:

> "The declaration does indeed allege that 'by reason of the aforesaid wrongful, illegal and fraudulent acts of the said * * * company, permitted and participated in by the defendants,' the corporation became bankrupt and was rendered wholly unable to pay its debts, and especially the interest on its bonds; and that the state has been compelled to make certain payments on that account, 'which she would not have been compelled to pay but for the wrongful, illegal and fraudulent acts of the defendants and said corporation;' and that, 'by reason of the aforesaid wrongful, illegal and fraudulent acts of the said * * * company and of the defendants, the said plaintiff has been further damnified and injured to the additional extent of one million of dollars in settling her liability created and evidenced by her aforesaid endorsement of

said endorsed bond;' *but this is not enough*, unless the facts in which this conclusion is drawn are such as to show that the loss was both the natural and immediate consequence of the wrongful and fraudulent acts referred to.

"*Pleadings must state facts, and not conclusions of law merely, and the allegation in this case that the loss arose from the fraud is only a conclusion of law. If the facts from which the conclusion is drawn are not sufficient to show that in law the loss was attributable to the fraud, the declaration is bad.*"

However, in alleging the authority of the Maysville and Big Sandy Railroad Company to make the lease to be pursuant to the amendment to its charter, the Chesapeake and Ohio Railway Company in effect admits the liability of the Maysville and Big Sandy Railroad Company for the torts of its operating agent; inasmuch as the *Court of Appeals*, in construing this special act of the legislature in this case, *concluded* that such liability does exists. The question of such liability being one of the issues of law arising upon the facts of this case, which must be determined by the court in which the suit is heard upon its merits; (Evans *v.* Felton, 96 Fed. Rep., 177; L. & N. R. R. Co. *v.* Wangelin, 132 U. S., 599,) and having been determined adversely to appellant's contention, it can not, except as a conclusion of the pleader, be said to be a sham or fraudulent issue wrongfully injected into the case for the sole purpose of defeating the right of removal.

In the case of Clinger's Admx. *v.* C. & O. Ry. Co. of Ky., etc., 109 S. W. Rep., 315, it is said:

"The order of removal was made upon the petition of appellee, the Chesapeake and Ohio Railway Company of Virginia, a foreign corporation. It was alleged in the

petition, in substance, that it and the plaintiff were citizens of different states, that its co-defendants, the Chesapeake and Ohio Railway Company of Kentucky and Shannon Hall, were not necessary nor proper parties to the action, and that they were made defendants for the sole purpose of preventing a removal of the cause to the federal court, thereby unlawfully and fraudulently depriving the petitioner of a right conferred upon it by the Constitution and laws of the United States; and averred that the allegations of negligence contained in plaintiff's petition as to its co-defendants were untrue, and known to be so by her when this suit was brought. It was further alleged that the petition of plaintiff stated no cause of action at all against its co-defendants, or either of them. *The charge that its co-defendants were not necessary nor proper parties to the action, and that her sole purpose in making them defendants was a fraudulent one to deprive it of its constitutional right, amounts only to a conclusion of the pleader.* She could, possibly with the same propriety, have stated that they were necessary parties, and that the petition of appellee for removal was for the fraudulent purpose of depriving her of the right to a trial of the case at her residence; and *this is also true of the allegation in the petition for removal that the negligence charged in her petition against its co-defendants was untrue, and so known by the plaintiff at the same time she filed her petition. This allegation and the others referred to did not state any jurisdictional fact.* The question of negligence or no negligence was an issue solely within the province of the jury to hear and determine. See Chesapeake & Ohio Ry. Co. *v.* Dixon, 179 U. S., 131; 21 Sup. Ct., 67; 45 L. ed., 121; Cincinnati, New Orleans & Texas Pacific Ry. Co. *v.* George Bohon, 200 U. S., 221; 26 Sup. Ct., 166; 50 L. ed., 448; Rutherford *v.* Illinois Central R. R. Co., etc., 120 Ky., 15; 85 S. W. Rep., 199, and

Illinois Central R. R. Co. *v.* Sheegog's Admr., 103 S. W. Rep., 323; 31 Ky. L. Rep., 691."

In the Dixon case, supra, Chief Justice Fuller said:

"If the liability of defendants, as set forth in that pleading, was joint and the cause of action entire, then the controversy was not separable as matter of law, and *plaintiff's purpose in joining Chalkey and Sidles was immaterial.* The petition for removal did not charge fraud in that regard or *set up any facts and circumstances indicative thereof,* and plaintiff's motive in the performance of a *lawful act* was not open to inquiry."

Since, under the law of Kentucky, the domestic corporation is absolutely responsible herein for the torts of the foreign corporation, and since the latter had no authority to make the alleged lease, the allegations of fraud in the petition for removal were not only conclusions of the pleader; but, in the nature of the case, it was also impossible for the petitioner to allege any facts or circumstances indicative of fraud in the lawful joinder of the two corporations. In this respect, the case at bar differs materially from the case of Dishon *v.* Cincinnati, N. O. & T. P. Ry. Co., 133 Fed. Rep., 471; and the case of Wecker *v.* National Enameling & S. Co., 204 U. S., 178; for, whereas in the case at bar the absolute right to join the two corporations exists; the right to join a corporation and any of its resident employes, under the law of Kentucky, is not absolute, but conditioned upon the statement in good faith of facts sufficient to impose upon the resident employe liability jointly with the corporation. In cases like the one at bar, there is no chance of a fraudulent joinder; but in cases where the corporation is joined with any of its resident employes there may be. For example, in the Dishon case, supra, it is said:

"We think the court was right in refusing to remand the case to the state court. At the time the petition for removal was filed, nearly three months had elapsed since summons issued for Coffman had been returned, 'Not found.' No efforts were being made to bring Coffman into court and prosecute the action against him. The petition for removal, which was verified, denied that Coffman was a citizen of Kentucky, averred that he had not been served with summons, and alleged that it was not the purpose of the plaintiff to prosecute the action against him, but that he had been made a party defendant for the sole purpose of preventing the removal of the case to the United States court. *It further averred that Coffman 'did not in any manner or degree contribute to the death or injury of said plaintiff's decedent through his own negligence or through any joint negligence with this petitioner;'* that the plaintiff knew this when he filed his petition; and that Coffman was a sham defendant—made so for the sole purpose of fraudulently defeating the jurisdiction of the United States court."

But where, as in the case at bar, no facts or circumstances indicative of fraud can be alleged, the motive in the performance of a lawful act, is not open to inquiry; and, therefore, the Dishon and Wecker cases, supra, can not be invoked to support a contention that there should be in such a case a traverse of the petition for removal.

"A pleader is under no obligation to deny the legal conclusions set out in the pleadings of his adversary; indeed, it would be improper for him to do so. It can not be presumed, therefore, that the truth of such allegations is admitted because not denied." Encyc. of Pleading and Practice, Vol. 12, page 1025.

## IV.

## THE PETITION OF DEFENDANT IN ERROR STATED A JOINT AND NOT A SEPARATE CAUSE OF ACTION AGAINST PLAINTIFFS IN ERROR.

(*a*)

BECAUSE THE LIABILITY OF THE MAYSVILLE AND BIG SANDY RAILROAD COMPANY EXISTS BY VIRTUE OF SECTION 206 OF THE KENTUCKY CONSTITUTION.

In the case of Illinois Central R. R. Co. *v.* Sheegog's Admr., 103 S. W. Rep., 327, it is said:

> "Even if the *act* and the *lease* had not been defectively pleaded, the result would be the same. The Chicago, St. Louis and New Orleans Railroad Company was given a franchise by the state, and it therefore assumed certain burdens, and under the constitution and laws of this state, it can not by a lease exempt itself from responsibility for the torts of itself and lessee. In the case of Lee *v.* Southern Pacific R. R. Co., 47 Pac., 932; 116 Cal., 97; 38 L. R. A., 71; 58 Am. St. Rep., 140, the court said: 'Where a statute authorizing leases contains no clause exempting in any respect the lessor from liability, it is well settled that the lessor still remains liable for an injury resulting from the negligent omission of a duty owed by it to the public, such as the proper construction of its road, station houses,' etc. Section 203 of the state constitution is in these words:
>
> " '*No corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liability of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or*

*enjoyment of such franchise or any of its privileges.* The court in construing this section of the constitution, in the case of McCabe's Admx. *v.* Maysville and Big Sandy Railroad Company, supra, said: 'The franchises of a corporation are its property. The declaration that these, in case of a lease or alienation, shall not be relieved from the liability of the lessor or grantor, lessee or grantee, contracted or incurred in the use of the franchise, or any of its privileges, is, in substance, a declaration that the corporation shall not be relieved of such liability, for its existence is inseparable from all of its franchises. Under this section, therefore, no lease made by a corporation can exempt it from liability for the wrongs of the lessee. If the lease in question was made after the adoption of the constitution, it would not exempt the lessor from liability; * * * but, if it was made before the adoption of the constitution, the result is the same.' ''

(*b*)

BECAUSE THE MAYSVILLE AND BIG SANDY RAILROAD COMPANY, A KENTUCKY CORPORATION, IS LIABLE TO THE PUBLIC FOR THE TORTS OF ITS OPERATING AGENT, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, A VIRGINIA CORPORATION; AND, THEREFORE, A JOINT CAUSE OF ACTION ARISES UNDER SECTION 241, KENTUCKY CONSTITUTION, AND SECTION 6, KENTUCKY STATUTES.

The case relied upon to sustain the contention that the Maysville and Big Sandy Railroad Company is not liable to the public for the torts of its operating agent, the Chesapeake and Ohio Railway Company, is the case of Arrowsmith *v.* Nashville and D. R. R. Co., 57 Fed. Rep., 165. That is a

case where, construing the statutes of Alabama and Tennessee for the first time, the court said:

> "There *was express statutory authority* to support the leasing of the Nashville and Decatur Railway to the Louisville and Nashville by the legislatures of *both the states of Tennessee* and Alabama. Sections 1122 and 1123 of the Code of Tennessee of 1858, being sections 1249D and 1249E of compilation of Millikian & Vertree's, are as follows:
>
> " '1122. A railroad company owning any main line may contract with any company owning a railroad connection with such main line for the lease thereof.
>
> " '1123. The lessee shall hold such road subject to the liens and *liabilities* to which it was subject in the hands of the lessor and *be bound for all payments for which the lessor was liable.*'
>
> "The effect of these sections is to *permit connecting lines to be leased and to impose upon the lessee company all liabilities in favor of the state, or the general public, imposed by the charter of the lessor company or the general law of the state.* The Alabama statute is equally explicit as to the power to make a lease, and it is equally silent as to the future exemptions and liabilities of the lessor company. (See Alabama Acts of 1868, pages 470, 471.) The question for decision is *res integra* in Tennessee. The same may be said as to Alabama, the state within which plaintiff's intestate sustained the injury from which he died."

We find, then, two things worthy of observation, which do not exist in the case at bar: First, that the court was construing the statutes of Alabama and Tennessee, which not only authorized a railroad company, owning a main line, to lease a

connecting line, *but which also imposed upon the lessee the liabilities in favor of the state or the general public imposed by the charter of the lessor company or the general law of the state;* and, second, that these statutes *never having been construed by the supreme court of said states*, the question as to the intention of the legislature in enacting them was *res integra*. Moreover, the *distinction* between the *Arrowsmith case* and the case at bar is made by the court in that case, on page 174, where it is said:

> "Plaintiff also cites and relies upon Questead *v.* Railway Co., 127 Mass., 204. That case was this: The horse railway company leased its line of railway *under a statute*, which authorized it to lease its road and franchise to any responsible party *for the operation of the road*, but provided that such lease or contract shall *not release* or *exempt* such company from any duties, liabilities or restrictions to which it would otherwise be subject. The court held, *that the effect of this provision was that the defendant had the same liability to compensate persons injured during the management of the road, while the lease was in force, as it would have had if the corporation had been managing its own road. The case turned wholly upon the construction of the statute authorizing the lease.*"

We have, then, an implied, if not an expressed, recognition by the court in the Arrowsmith case of the correctness of the ruling in the Questead case, fixing upon the lessor liability to the public for the torts of its lessee, and inasmuch as the facts in the Questead case are practically the same as those in the case at bar, the Arrowsmith case, in reality, supports the contention of defendant in error as to the liability of the domestic corporation, *even if the foreign corporation had possessed authority to make the contract.*

(c)

BECAUSE THE CONSTRUCTION OF THE ACT OF THE LEGISLATURE OF KENTUCKY IS THE GROUND OF THE DECISION OF THE KENTUCKY COURT OF APPEALS IN THE M'CABE CASE.

From even a cursory reading of the case of McCabe's Admx. *v.* M. & B. S. R. R. Co., 112 Ky., 861, it will be seen that the court rests the liability of the Maysville and Big Sandy Railroad Company to the public for the torts of its operating agent, the Chesapeake and Ohio Railway Company, upon the ground that the lessor had no contractual power to exempt itself from liability to the public for the torts of its lessee; that the lessor still retains paramount authority as master and the lessee is merely an operating agent or servant; and this lack of contractual power to do otherwise is the construction the court gives to or places upon the statute of Kentucky, passed February 17, 1866. (See Acts of 1866, Vol. 1, page 664.) In considering this act and its various amendments, the court used this language:

> "*The common law distinctions between different forms of action have been abolished by our Code of Practice, and all persons who are liable for a wrong may now be sued jointly in this state in an action to recover for negligence.* A railroad company is given by the state certain franchises, and, therefore, assumes certain burdens. These it can not transfer to another *without legislative authority*, so as to exempt it from responsibility for the torts of its transferee. *In the absence of legislative authority, the Maysville and Big Sandy Railroad Company was, therefore, liable to appellant, jointly with the Chesapeake and Ohio Railway Company, if the transfer was unauthorized;*

*and, in this event, the suit against the two companies jointly might be properly maintained.* We are also referred to the following provision: 'Act of February 17, 1866, section 3. (See Acts of 1866, Vol. 1, page 664.) The purchaser or purchasers at such sale, after the same had been ratified and approved by said court, shall, in virtue thereof, be invested with the title to said road and all its franchises and charter privileges as fully and completely as if the same had originally been granted to them. They shall have power to organize a company, under its charter, and for the purpose of its charter, open books and receive and collect subscriptions of stock to said company, *make contracts with individuals, corporations and other railroad companies for the building, completion and operation of said road or any part thereof.*' When this statute was passed, the road was not completed; *the purpose of the provision was to enable the company to complete and operate the road. To this end* it was empowered to 'make contracts with individuals, corporations, and other railroad companies for the building, completion and *operation* of said road or any part thereof.' Thus, power was granted it to make the contracts with the Chesapeake and Ohio Railway Company *above referred to; but no exemption was granted from any liability* which attached to it, *and such exemption as against the public can not be implied.* While there is some conflict of authority with them, the great weight supports this conclusion."

(*d*)

BECAUSE THE RULE IN THE M'CABE CASE IS THE SETTLED LAW IN KENTUCKY.

We have not been able to find any case where the Court of Appeals of Kentucky had under consideration the provisions of

the statute similar to the special act of the legislature creating the Maysville and Big Sandy Railroad Company, which is in conflict with the decision in the McCabe case.

The case of Harper *v.* Newport News R. R. Co., 90 Ky., 360, is expressly referred to in the McCabe case, wherein the court said:

> "In Harper *v.* Railroad Co., 90 Ky., 59, the question is not elaborated, and it is apparent from the opinion that only the question of jurisdiction was considered by the court, for it does not appear from the facts stated that the lease in that case was authorized by the statute, or under what provision of law it was made."

The case of Sinkhorn *v.* Lexington Turnpike Road Co., 112 Ky., 211, is not in conflict with the McCabe case, because the *general law* under which the turnpike was leased authorized it in effect to contract so as to exempt itself from liability. In other words, the legislature thereby conferred upon the turnpike company larger and more liberal contractual powers than the special act of the legislature conferred upon the Maysville and Big Sandy Railroad Company. That this distinction was made by the court, is easily inferred from the following language in the Sinkhorn case:

> "According to the law in the Harper case, if the lease is made of the entire road, its rights and franchises, *and it is by virtue of general law authorizing such lease, then* the lessor is not liable for the misdoings or torts of the lessee while in *such* possession."

Hence, although the Maysville and Big Sandy Railroad Company had authority to make *a* lease by virtue of its power "to make contracts with individuals, corporations and other railroad companies for the building, completion and *operation* of

its road, or any part thereof;" yet it had absolutely *no* authority to make *the* lease insofar as it undertook to contract away its liability to the public. Although such power had been given to the Lexington Turnpike Road Company, under the general turnpike law, yet no such power had been given under the special law and various amendments thereto creating the Maysville and Big Sandy Railroad Company. And in both cases the Court of Appeals was clearly construing acts of the Legislature of Kentucky and nothing else.

Moreover, that this distinction is well founded and was recognized by the Kentucky Court of Appeals, appears in the case of Howard *v.* M. & B. S. R. R. Co., 70 S. W. Rep., 631, where Judge White, *who wrote the opinion in the Sinkhorn case*, used this language:

> "We are of opinion that the petition states a cause of action against the Maysville and Big Sandy Railroad Company, as well as against the Chesapeake and Ohio Railway Company. By an agreement, pleaded as having been entered into between Maysville and Big Sandy Railroad Company and Reinert, the landowner, it becomes its duty to erect a fence along its right of way; and it was suffered and permitted to remain out of repair, and the appellant herein was injured thereby, he can recover against the company *owning the road*, as well as the one *operating under the lease*. The duty to maintain the fence and keep in repair can not be shifted from the Maysville and Big Sandy Railroad Company by the lease, so as to relieve itself from liability. (McCabe's Admx. *v.* R. R. Co. (Ky.,) 66 S. W. Rep., 1054.) The court, therefore, erred in sustaining the demurrer to the petition."

Then, again, in the case of Davis's Admr. *v.* C. & O. Ry. Co., 75 S. W. Rep., 277, the Kentucky Court of Appeals

again recognized the rule in the McCabe case, and used the following language:

> "After a petition for removal had been filed, appellant tendered an amended petition making the Maysville and Big Sandy Railroad Company, the domestic corporation and appellee's lessor, a defendant. It came too late to prevent a removal of the case, Therefore it was not within the rule of McCabe, (Ky.) 66 S. W., 1054; *Pierson v. Ill. Cent. R. R. Co.*, (*C. C.*,) *118 Fed., 342.*"

In the case of Swice's Admr. *v.* M. & B. S. R. R. Co., 75 S. W. Rep., 278, the Court of Appeals once more reaffirmed the doctrine in the McCabe case, at the same time differentiating the two cases.

In the case of Brooker *v.* M. & B. S. R. R. Co., 119 Ky., 137, the Court of Appeals again reaffirmed the rule in the McCabe case, using the following language:

> "It is not averred that the lease was made with leave of the county court, and from the allegation that all three of the defendants are operating the ferry, the presumption would be that the Chesapeake and Ohio Railway Company is operating under the authority granted the Maysville and Big Sandy Railroad Company. In McCabe's Admx. *v.* M. & B. S. R. R. Co., 112 Ky., 861, it was held that the only authority in the Maysville and Big Sandy Railroad Company to lease its road was that derived from the Act of February 17, 1866, (Acts, 1865–66, p. 664, c. 755,) authorizing it 'to make contracts with individuals, corporations and other railroad companies for the building, completion and *operation* of its road or any part thereof,' but it was held that thereby no exemption was granted from any liability which attached to the company. The court said: '*In the case before us there is only a grant to the lessor of power to*

*contract for the operating of the road.* The company enjoys all its franchises in the fruits of the contract. There is nothing in the provision to show that the legislature had in mind authorizing the company to divest itself of its franchises or permitting it, while enjoying them or their fruits, to be acquit of their responsibility for their abuse, without regard to the financial ability of the lessee or his amenability to suit.' *To this construction of the statute we adhere.*"

In the case of Illinois Central R. R. Co. *v.* Sheegog's Admr., 103 S. W. Rep., 327–328, the court again approved the rule in the McCabe case, as follows:

"It will be seen from the petition of removal that there is no allegation that the act authorizing the lease even attempted to relieve the lessor from its primary responsibility to the public; and the court in the McCabe case continuing, said: 'After conferring upon a corporation the right of eminent domain, with many other special privileges which the legislature is empowered to grant only in consideration of its duty and obligation to serve the people by affording them the means of safe as well as speedy transportation for themselves and their property, the state can not be held to have abdicated its right to protect the patrons of the road who are under its care by the strained construction of a naked power to lease. Such a power does not carry with it the authority to the lessor to absolve itself and transfer its duties and obligations to another, whether able or unable to respond in damages for its wrongs and defaults.' See to the same effect: Balsley *v.* Railroad Co., 119 Ill., 68; 8 N. E., 859; 59 Am. Rep., 784; Singleton *v.* Southwestern R. R., 70 Ga., 464; 48 Am. Rep., 574; Tillett *v.* Railroad Co., 118 N. C., 1031; 24 S. E., 111; Railroad Co. *v.* Morris, 68 Tex., 59; 3 S. W., 457; Chollette *v.* Railroad Co., 26 Neb., 169; 41

N. W., 1106; 4 L. R. A., 135; Parr *v.* Railroad Co., 43 S. C., 197; 20 S. E., 1009; 49 Am. St. Rep., 826; Pennsylvania Co. *v.* Ellett, 132 Ill., 654; 24 N. E., 559; Stephens *v.* Railroad Co., 36 Iowa, 327; Bower *v.* Railroad Co., 42 Iowa, 546; Railroad Co. *v.* Lee, 71 Tex., 538; 9 S. W., 604. * * * If it be true, as the decisions with substantial unanimity admit, that the lessor railway remains liable for the discharge of its duties to the public, unless expressly exempted therefrom by statute, it seems difficult to conceive its absence of liability in any event, except, perhaps, where the plaintiff is suing upon an express contract made with him by the lessee corporation. Is it not as much a public duty on the part of the railway corporation to operate its trains without negligence as it is to receive all freight offered for transportation, or to carry all passengers who offer to pay the regular rates, or to keep its tracks and station houses in safe condition? In truth, we do not know of any duties of a railway corporation which are of a private character. * * * By its acceptance of the franchise conferred by the state, the corporation assumed the corresponding burdens thereby imposed. These franchises it could not transfer to another without distinct legislative authority. The grant of power to lease its property is one thing; the grant of absolution from its responsibility is another, and is not to be inferred from a mere power to lease the road where the corporation still retains its existence and the enjoyment of its franchises in the rents, for such grants are strictly construed, and, as against the public, are never extended by any construction. *In the case before us, there is only a grant to the lessor of power to contract for the operating of the road.* The company enjoys all its franchises in the fruits of the contract. There is nothing in the provision to show that the legislature had in mind authorizing the company to divest itself of its franchises,

or permitting it, while enjoying them or their fruits to be acquitted of responsibility for their abuse, without regard to the financial ability of the lessee or his amenability to suit.

"But it is said that this responsibility of the lessor does not apply to the employes of the lessee of the road, that the lessor owed no duty to them, and that they are not members of the public in the sense used in the decisions on that subject. It is true that the courts in part have made this distinction, but have only extended the rule and exempted the lessor from torts of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased property, but hold the lessor bound for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station houses, etc. *In the case of Swice's Admx.* v. *Maysville & Big Sandy R. R. Co., 116 Ky., 253; 75 S. W., 278, this distinction was recognized to be the true rule.*"

In the case of Clinger's Admx. *v.* C. & O. Ry. Co., 109 S. W. Rep., 317, the Court of Appeals on April 15th, 1908, again reaffirmed the rule in the McCabe case, as follows:

"The only question remaining to be determined is whether the Chesapeake and Ohio Railway Company in Kentucky is responsible in damages with the Chesapeake and Ohio Railway Company in Virginia for the death of plaintiff's intestate. *Appellee's counsel virtually concede that, if the provisions of the charter of the Maysville and Big Sandy Railroad Company, which charter the Chesapeake and Ohio Railway Company in Kentucky took when it was incorporated, with reference to its powers to lease the road, are in full force and effect, under the authority of the case of McCabe's Admx.* v. *M. & B. S. R. R. Co., 112 Ky., 861; 66 S. W., 1054, the Chesapeake and Ohio*

*Railway Company in Kentucky would be responsible jointly with the lessee, the Virginia corporation;* but contend that this provision of the charter of the Maysville and Big Sandy Railroad Company stands repealed by section 573 of the Kentucky Statutes of 1903, which in effect says that all provisions of charters and articles of incorporation which are inconsistent with the provisions of chapter 32 of the Kentucky Statutes stand repealed to the extent of such conflict, and claims that the lease made by the Chesapeake and Ohio Railway Company in Kentucky to the Virginia corporation was made under the provisions of section 769, Ky. St., 1903. The first part of this section deals with the construction of spurs, tracks or branches of roads by railroad companies organized in Kentucky, and also authorizes such corporations to purchase the property and franchise of any other railroad company not a competing or parallel line, then authorizes such corporations to sell its franchise and property to any other company not a competing or parallel line, or not otherwise prohibited by law to purchase; and after speaking of other matters not germane to the matter under consideration, the section closes with these words: 'And may make any agreement or arrangement, not inconsistent with law, with any other railroad company.' *There is no claim that the Chesapeake and Ohio Railway Company in Kentucky sold its property and franchises to the Chesapeake and Ohio Railway Company in Virginia; but appellees claim that the lease was made under the clause of section 769, above quoted,* and that it exempts the Chesapeake and Ohio Railway Company in Kentucky from all responsibility, while the Chesapeake and Ohio Railway Company in Virginia controls and operates the road. We deem it unnecessary to consider and determine whether the provision of the charter referred to in the McCabe case, supra, was repealed or not by the enactment of section 573, Ky. St., 1903, for the

reason that, in our opinion, if the lease was made under the authority of section 769 Ky. St., 1903, it did not have the effect to relieve the Chesapeake and Ohio Railway Company in Kentucky from the same responsibility as existed under the charter of the Maysville and Big Sandy Railroad Company before the enactment of section 573."

Then, again, on page 318, the court in the same case said:

"Appellees' counsel contends that the cases of Harper *v.* N. N. & M. V. Ry. Co., 90 Ky., 360; 14 S. W., 346, and Sinkhorn *v.* Lexington, H. & P. Turnpike Co., etc., 112 Ky., 205; 65 S. W., 356, establish a different rule, and have the effect to release the lessor from liability for the negligence of appellees' servants in the operation of trains. The Harper case was decided September, 1890, and it appears that the employes of the Newport News & M. V. Ry. Co. (a lessee) caused the injuries to Harper; but it does not appear whether Harper was an employe of that company or a third party. The presumption is that he was an empioye. If otherwise, the opinion would be against the trend of all the authorities. The Sinkhorn case was one wherein Sinkhorn received his injuries by reason of a defective bridge on a turnpike road, after the county had become the owner of it under legislative authority, after a vote by the people of the county. When Sinkhorn was injured the turnpike company did not own the road or the franchise. The county owned both. The county was relieved from responsibility on the general principle that a county could not be made liable for such torts. Of course, the turnpike company was not liable, because it had no interest in the road at the time Sinkorn was injured; and the court, in substance, said that when the turnpike company had surrendered all *ownership and control* to the county, it was not responsible for the torts of the county."

In view of these decisions there would seem to be no room for doubt, not only that the rule in the McCabe case is the settled rule of law in Kentucky; but also that in said case, the Court of Appeals was interpreting an act of the legislature, and that its interpretation thereof to the effect from lack of contractual power the lessor retains paramount authority as master and the lessee is merely an operating agent or servant was the ground of its decision.

(*e*)

BECAUSE THE FEDERAL COURT SHOULD FOLLOW THE DECISIONS OF THE KENTUCKY COURT OF APPEALS CONSTRUING THE KENTUCKY CONSTITUTION AND STATUTE.

For the reason that the Kentucky Court of Appeals has cited the Pierson *v.* Ill. Cent. R. R. Co., (C. C.,) 118 Fed., 342, in support and as expressive of its views of the law upon the question in issue, we quote from Judge Shiras's opinion as follows:

> "If the statutes of Iowa in providing for the leasing of a line of railway, had *in express terms* declared that the lessor company should *not* be liable for injuries resulting from the negligence of the lessee in operating the leased line, or if the supreme court of the state, in determining the construction to be placed upon the terms of the statute authorizing the leasing of the railway lines, had held that the lessor could *not* be held liable for the negligence of its lessee in the operation of its line, so that it was the settled law of the state that the lessor company could *not* be lawfully charged with liability for the negligence of the lessee in the operation of the leased railway, *then* the act of joining in one case the lessor and the lessee as

defendants would justify the court in holding that such joinder was not in good faith, but must have been with the intent of thereby defeating, if possible, the re-removal existing in behalf of the real defendant to the cause of action declared on by plaintiff. On the other hand, *if, under the law of the state*, the lessor and lessee are *each* liable to anyone injured through negligence in the operation of the railway lines, *then*, of course, it could not be held that either of these parties was a nominal or sham defendant to a suit brought against them jointly, based upon the operation of the leased railway line. If, however, the question of liability on the part of the lessor company for the results of the negligence of its lessee in the operation of the line has not been settled, either by express legislative declaration, or *by the decision of the supreme court of the state*, then it can not be justly said that a plaintiff who seeks to obtain a judgment against both the lessor and lessee for injuries caused him in the negligent operation of the cars or trains on the leased line, is open to the charge of endeavoring to fraudulently defeat the right of removal by joining a nominal or sham party as a defendant in the suit.

"In consideration of the question arising on the motion to remand in this case, the court is confined to the inquiry *whether it is the settled law of the State of Iowa that the lessor of a line of railway within the state is not liable for the negligence of its lessee in the operation of the leased line of railway?* If this question has not been finally determined, either by legislative declaration *or judicial decision*, but exists and is presented in the case as a question to be solved in the further progress of the suit, in the consideration of the rules of law applicable thereto, then this issue of the liability of the lessor company can not be said to be a sham or fraudulent issue, wrongfully injected into the case, for the sole purpose of defeating

the right of removal. It is not claimed on behalf of the railway company that there is to be found in the statute law of the state any declaration expressly providing that a lessor railway company is not liable for the negligence of its lessee in the operation of the leased line, and counsel have not called to the attention of the court any decision of the supreme court of the state wherein it is ruled that such liability does not exist. * * * *The question of such liability is one of the issue of law arising upon the facts of this case, which must be determined by the court in which the suit is heard upon its merits; and, therefore, upon the face of the record there is presented for determination a question of the Dubuque and Sioux City Company (lessor,) a question or controversy between citizens of the same state, a question which is an open one, which the plaintiff has a right to present and which the court can not say is asserted without foundation and as a mere sham or device instituted solely to defeat the right of removal on behalf of the lessee company.*

"Do the facts set forth in plaintiff's petition show that there is involved in the suit a separable controversy between the plaintiff and the Illinois Central Railroad Company, in which the Dubuque and Sioux City Railroad Company has no interest, and which can be wholly determined without affecting the rights of the Dubuque and Sioux City Railroad Company? The ground of liability against the Illinois Central Railroad Company is negligence in furnishing a badly constructed and unsafe car for the use of the employes. The ground for liability charged against the Dubuque and Sioux City Railroad Company is that the company is the owner of the line of railway between Dubuque and Sioux City; that it committed the management and operation of the line to the Illinois Central Railroad Company, as its lessee; that the lessee was negligent in operating the line, and for the results of such

negligence the lessor is responsible. *The Dubuque and Sioux City Railroad Company is clearly interested in the issue of negligence in the operation of its leased line by its lessee, and on the trial of the case will be entitled to be heard on the issue.* That company has a vital interest in the question, and as the case stands, it can not be decided that the Illinois Central Railroad Company was guilty of negligence in the particular charge without affecting the interest of the Dubuque and Sioux City Railroad Company; and on the other hand, if it should be decided that the Illinois Central Railroad Company was not guilty of the negligence charged against it, then the case would fail as to the Dubuque and Sioux City Railroad Company for the issue tendered by the plaintiff in his petition as against the latter company, is that the Illinois Central Railroad Company is guilty of negligence, causing the injury complained of, and the Dubuque and Sioux City Railroad Company, as the owner and lessor of the line of railway, is liable for the negligence of its lessee in the operation of the road. In no view that can be taken of the case, can it hold that the Dubuque and Sioux City Railroad Company had no interest in the question of negligence charged against the Illinois Central Railroad Company; and, this being so, then it can not be held that the suit presents a controversy solely between the plaintiff and the Illinois Central Railroad Company, but on the contrary, it appears that the Dubuque and Sioux City Railroad Company has a direct and vital interest in the question or controversy existing between the plaintiff and the Illinois Central Railroad Company, and the case does not, therefore, involve a separate controversy within the meaning of the removal statute; furthermore, as the plaintiff has elected to sue the defendants *jointly* for the consequence of the alleged negligence, *it is not open for either defendant to claim that the suit embraces a separable controversy within the meaning*

*of the removal statute.* It follows that the case was not removable to this court."

In the case of Leffingwell *v.* Warren, 67 U. S., 599, Mr. Justice Swayne said:

"*The construction given to the statute of the state by the highest tribunal of such state is regarded as part of the statute, and is binding upon the courts of the United States as the text. Leffingwell* v. *Warren, 67 U. S., 599–606; Commercial Bank* v. *Buckingham, 46 U. S., 317; Jackson* v. *Lamphire, 28 U. S., 280.*

"It is for state courts to construe their own statutes; the Supreme Court will not review their decisions except when specially authorized by statute. Ross *v.* Duval, 13 Pet., U. S., 45.

"*The meaning of a state statute declared by the highest court of a state is conclusive upon the Supreme Court of the United States. Morley* v. *Lake Shore, etc., Ry. Co., 146 U. S., 162; Miller* v. *Swan, 150 U. S., 132; Merchants* v. *Penn. R. R. Co., 153 U. S., 380; Fallbrook Irr. Dist.* v. *Bradley, 164 U. S., 112; First Nat. Bank of Aberdeen* v. *Chehalis County, 166 U. S., 440.*

"*When the highest judicial tribunal of a state has determined the extent of the powers and liabilities of corporations created under its laws, the decision is conclusive on the national courts in all cases in which no question of general or commercial law and no question of right under the Constitution of the United States is involved. 92 Fed. Rep., 124–128; 12 C. C. A., 566; Claiborne* v. *Brooks, 111 U. S., 400; Detroit* v. *Osborne, 135 U. S., 499.*"

In the case of Gilman *v.* Sheboygan, 67 U. S., 518, it is said:

"*Acting upon the principles, recognized in its administration from the earliest period of its history, this court*

*considers itself bound in cases like this, to follow the settled adjudications of the high state court, giving constructions to the constitution and laws of the state.*"

In the case of L. & N. R. R. Co. *v.* Kentucky, 183 U. S., 508, it is said:

> "It was contended in the courts below and here that as section 218 of the Constitution of the State of Kentucky, regulating charges for transportation over different distances, is in terms a copy of the provision on the same subject in the Interstate Commerce Act, it should be assumed that it was the intention of the Constitutional Convention of Kentucky to adopt the construction put upon that provision in the interstate commerce law by the federal courts; and that as those courts had held that the existence of actual competition of controlling force in respect to traffic important in amount might make out a dissimilarity of circumstances and conditions entitling the carrier to charge less for the longer than for the shorter haul, without any necessity to first apply to the Commission for authority so to do, that construction should have been followed at the present trial, where evidence was offered tending to show the existence of competition of that character, caused by river transportation of coal from points outside of the state.
>
> "*Such contention might seem reasonably to have been urged in the state courts, but, as they have seen fit to disregard it, and to put a different construction upon the language employed, this court must accept the meaning of the state enactments to be that found in them by the state courts.*"

To the same effect are Luther *v.* Borden, 7 How., 40; Webster *v.* Cooper, 14 How., 505; Township of Elmwood *v.* Marcy,

92 U. S., 294; Stone *v.* Wisconsin, 94 U. S., 183; Louisville *v.* Savings Bank, 104 U. S., 471; Stutsman County *v.* Wallace, 142 U. S., 306.

In view of the foregoing decisions, we submit that this court should follow the ruling of the Kentucky Court of Appeals in the McCabe, Brooker, Sheegog and Clinger cases, and hold that the lessor, Maysville and Big Sandy Railroad Company, is jointly liable to defendant in error for the negligence of its lessee, the Chesapeake and Ohio Railway Company, in causing the death of her intestate in operating its railroad.

(*f*)

BECAUSE CONGRESS, WHATEVER IT MIGHT DO, HAS NOT BY THE "REMOVAL ACT" CONFERRED UPON THE UNITED STATES CIRCUIT COURTS JURISDICTION WHERE THERE IS A PROPER JOINDER OF A RESIDENT WITH A NON-RESIDENT DEFENDANT, ACCORDING TO THE SETTLED LAW OF THE STATE; ALTHOUGH, ACCORDING TO THE LAW, AS ADMINISTERED THEREIN, THE UNITED STATES CIRCUIT COURTS, WHEN ENTITLED TO JURISDICTION, WOULD, UPON THE MERITS, HOLD NO CAUSE OF ACTION TO EXIST AGAINST THE RESIDENT DEFENDANT.

But whether the ground of the decision in the McCabe case was, or was not, the construction of the state constitution and statute, is immaterial, inasmuch as the settled rule of law in Kentucky is that the Maysville and Big Sandy Railroad Company is jointly liable with the Chesapeake and Ohio Railway Company for its torts in the operation of the road; and, therefore, the case at bar is clearly within the rule, as well as within the reason for the rule, in the case of Alabama G. S. R. R. Co. *v.* Thompson, 200 U. S., 219, where it is said:

"In good faith, so far as appears in the record, the plaintiff sought the determination of his rights, in the state court, by the filing of the declaration in which he alleged a joint cause of action.

"Does this become a separable controversy within the meaning of the act of Congress, because the plaintiff has misconceived his cause of action, and had no right to prosecute the defendants jointly? We think, in the light of adjudications above cited from this court, *it does not.* Upon the *face of the complaint*—the only pleading filed in the case—the action is *joint. It may be* that the state court will hold it *not* to be so. *It may be* (which we are not called upon to decide now) that *this* court would so determine, if the matter shall be presented in a case of which it has jurisdiction. But *this* does not change the *character* of the action which the plaintiff has seen fit to bring, nor change an *alleged joint* cause of action into a separable controversy *for the purpose of removal.* The case can not be removed, unless it is one which presents a separable controversy wholly between citizens of different states. In determining this question, the law looks to the case made in the pleadings, and determines whether the state court shall be required to surrender its jurisdiction to the federal court.

"Congress has *not said*, whatever it *might* do, that controversies between citizens of different states *shall be removable* wherein it is sought, *contrary* to the law, as administered in the federal courts, to hold the citizens of another state to *joint* liability in tort with the citizens of the state where the action is brought.

"The fact that the state court may have a different view from the courts of the United States of the common law, as to the *character* of such actions and the right to prosecute them *in form* joint, as well as several, *affords no ground of removal.* The federal courts, in some states,

hold a different rule as to the doctrine of fellow-servants from that administered in the state courts, and in other ways administer the common law, according to their own views. *It has not been suggested that a right of removal should arise from such differences. No more has Congress given the right where the state permits an action to be prosecuted jointly, which will be held to be several only in the courts of the United States.*"

In the case of Cincinnati, N. O. & T. P. R. R. Co. *v.* Bohon, 200 U. S., 226, it is said:

"An action for death by negligence, is regulated by the Kentucky constitution and statutes. Section 241 of the constitution provides: 'Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death from the *corporations* and persons so causing the same.'

"Section 6, of the Kentucky statute, is as follows: 'Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death from the person or persons, company or companies, *corporation or corporations*, their agents or servants, causing the same, and when the act is willful or the negligence gross, punitive damages may be recovered, and the action to recover such damages shall be prosecuted by the personal representative of the deceased.'

"This statute undertakes to give an action for negligence against the *companies or corporations* responsible therefor and their agents or servants causing the same.

"We then have a case in which the extent of the right to recover damages for negligence is prescribed by the constitution and statutes of the State of Kentucky, *and*

*which the courts of that state have construed to give a joint cause of action against the corporation and its agents or servants causing the same.* In a recent case, this court had occasion to deal with a question of removal under the separable clause (Southern R. R. Co. *v.* Carson, 194 U. S., 136,) on a writ of error to the supreme court of South Carolina. While the case did not show an attempt to remove, the discussion of the subject by the chief justice strongly intimates that if the action was properly joined, *in the forum in which it was being prosecuted*, it could not be removed as a separable controversy, under the act of Congress. We have under consideration an action for tort, which, by the constitution and laws of the state, *as interpreted by the highest court of the state*, gives a *joint* remedy against master and servant to recover for negligent injuries. This court has repeatedly held that a separable controversy must be shown upon the face of the petition or declaration, and that the defendant has no right to say that an action shall be several which the plaintiff *elects* to make *joint*.

"A state has an unquestionable right by its constitution and laws to regulate actions for negligence, and where it has provided that the plaintiff in such cases may proceed *jointly* or severally against those liable for the injury, and the plaintiff, in the due course of law and in good faith, has filed a petition electing to sue for a *joint* recovery *given by the laws of the state*, we know of nothing in a federal removal statute which will convert such action into a *separable* controversy *for the purpose of removal*, because of the presence of a non-resident defendant therein, properly joined in an action under the constitution and laws of that state wherein it is conducting its operations, and is duly served with process."

## IV.

## THE JUDGMENT IN QUESTION SHOULD BE AFFIRMED WITH DAMAGES.

Seven years have now passed since Peter McCabe's widow brought this suit for his death; and every obstruction known to the law has been interposed to prevent a recovery and delay collection of the judgment. Not the least, indeed, has been the prosecution of this writ of error in total disregard of the law as settled by former adjudications of this court; the correctness and applicability of which to this case are clearly beyond question. This is, therefore, a delay case under Rule 23 of this court. Rev. Stat., Sec. 1010; Pennywit *v.* Eaton, 15 Wall., 382; Texas, etc., Ry. Co. *v.* Volk, 151 U. S., 79; Gregory, etc., Mining Co. *v.* Starr, 141 U. S., 227; Insurance Co. *v.* Huchburgers, 12 Wall., 166; Hennessy *v.* Sheldon, 12 Wall., 440.

In the case of Whitney *v.* Cook, 99 U. S., 607, it is said:

> "*Our experience teaches us that the only way to discourage frivilous appeals and writs of error is by the use of our power to award damages, and we think this a proper case in which to say that hereafter more attention will be given to that subject, and the rule enforced, both according to its letter and spirit. Parties should not be subject to the delay of proceedings for review in this court without reasonable cause, and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked.*"

Respectfully submitted,

Allan D. Cole,
*Attorney for Defendant in Error.*

T. R. PHISTER,
R. D. WILSON,
W. T. COLE,
*Of Counsel.*

# CHESAPEAKE AND OHIO RAILWAY COMPANY v. McDONALD, ADMINISTRATOR.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 158. Argued April 19, 1909.—Decided May 17, 1909.

The Federal question must be properly and seasonably set up in the state court in order to give this court jurisdiction to review under § 709, Rev. Stat.

Where the state statute provides that an appeal from an order refusing to remove a cause to the Federal court must be taken within two years, and no appeal is taken, and the highest court of the State decides that an appeal from the judgment in the case taken more than two years after entry of the order refusing to remove does not bring up that order for review, the Federal question has not been properly preserved, and this court has no jurisdiction.

A Federal constitutional objection may be waived so far as having the right of review of a judgment in the state court is concerned where the question is not made in the state court by proper procedure. *Harding* v. *Illinois*, 196 U. S. 78.

31 Ky. L. R. 500, affirmed.

THE facts are stated in the opinion.

*Mr. E. L. Worthington*, with whom *Mr. W. H. Wadsworth*, *Mr. W. D. Cochran* and *Mr. LeWright Browning* were on the brief, for plaintiffs in error.

*Mr. A. D. Cole*, with whom *Mr. T. R. Phister*, *Mr. R. D. Wilson* and *Mr. W. T. Cole* were on the brief, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

The defendant in error, J. W. McDonald, as administrator of Nancy J. Wilson, deceased, on March 23, 1900, brought

suit in the Lewis Circuit Court of Kentucky against the Chesapeake and Ohio Railway Company and the Maysville and Big Sandy Railroad Company, and certain employés of the former, to recover damages for the alleged wrongful death of Nancy J. Wilson. On May 29, 1900, the Chesapeake and Ohio Railway Company, a corporation of Virginia, filed a petition for removal of the case to the United States Circuit Court for the Eastern District of Kentucky, and an order of removal was made accordingly. On September 3, 1902, the case having been remanded by the United States Circuit Court, it was redocketed in the state court. On January 19, 1903, the plaintiff discontinued the action as against the five individual defendants. On January 21, 1903, the Chesapeake and Ohio Railway Company filed another petition to remove the case to the United States Circuit Court on the ground of separable controversy. This motion for removal was overruled by the Lewis Circuit Court, and, thereafter, on May 19, 1904, the case went to trial in the Lewis Circuit Court, and that court directed a verdict for the railroad companies. Upon appeal to the Court of Appeals of Kentucky that judgment was reversed. 27 Ky. L. R. 778.

A second trial of the case in the Lewis Circuit Court, on September 27, 1906, resulted in a verdict and judgment for the defendant in error. From that judgment an appeal was taken to the Kentucky Court of Appeals and it was there affirmed. 31 Ky. L. R. 500.

The Federal question attempted to be presented grows out of the alleged error in refusing, upon the second application, to remove the cause from the Lewis Circuit Court to the United States Circuit Court for the Eastern District of Kentucky.

The right to review a judgment of a state court by error proceedings in this court is regulated by § 709 of the Revised Statutes of the United States. To lay the foundation for such right of review it is necessary to bring the Federal question in some proper manner to the consideration of the state court whose judgment it is sought to review; if this is not done, the Federal question cannot be originated by assignments of error

in this court. The Federal right asserted in this case comes within the third class named in § 709 of the Revised Statutes, wherein a right, title, privilege or immunity is claimed under the United States, and the decision is against such right, title, privilege or immunity. In this class of cases the statute requires that such right or privilege must be specifically set up and claimed in the state court, and in any of the classes of cases mentioned in § 709 it is essential that the record disclose that the Federal question involved was decided, or that the judgment necessarily involved the Federal right and decided it adversely to the claim of the plaintiff in error. *Columbia Water Power Co.* v. *Columbia Street Ry.*, 172 U. S. 475; *Fowler* v. *Lamson*, 164 U. S. 252; *Clarke* v. *McDade*, 165 U. S. 168, 172; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 248. In the latter case this court said:

"It is well settled that this court, on error to a state court, cannot consider an alleged Federal question, when it appears that the Federal right thus relied upon had not been by adequate specification called to the attention of the state court and had not been by it considered, not being necessarily involved in the determination of the cause. *Green Bay & Miss. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 52, 67; *Oxley Stave Co.* v. *Butler Co.*, 166 U. S. 648, 654, 655, and cases cited."

In the opinion of the Kentucky Court of Appeals in this case the question of the correctness of the order of removal is not considered, nor is there anything in the record to indicate that the alleged error in refusing to remove the case on the second application was brought to the attention of the Kentucky Court of Appeals. In this court the assignments of error concern the alleged error in refusing to remove the case upon the second application, and avers that the Kentucky Court of Appeals erred in holding, in substance and effect, that the plaintiff in error had no such right of removal. But, as we have said, the assignments of error in this court cannot enlarge the right of review. Moreover it is apparent that if the question of the right of removal was brought before the Ken-

tucky Court of Appeals upon the judgment to which this writ of error is prosecuted, it would not have considered the question. The refusal to remove upon the second application was in January, 1903. The judgment, which was taken to the Court of Appeals for review in the present case was rendered on September 27, 1906.

The Kentucky Civil Code of Practice provides that an appeal from judgments and final orders, which includes such orders as the one now under consideration (*Hall & Long* v. *Ricketts*, 9 Bush [Ky.], 366, 370), shall not be granted except within two years after the right of appeal first accrued. No appeal was taken from the order refusing to remove within two years. At the time when the appeal in the present case was made to the Kentucky Court of Appeals it was too late to review the order refusing to remove. In the case of *M. & B. S. R. R. Co.* v. *Willis*, 104 S. W. Rep. 1016, 1018, the Court of Appeals of Kentucky, dealing with the question, said:

"It is further insisted that it was error not to grant the request of appellant to remove the action to the Federal court. This motion was based upon the ground that the original petition did not state a good cause of action either against the Chesapeake and Ohio Railway Company, which is a foreign corporation, or the resident defendant, the Maysville and Big Sandy Railroad Company. . . . The action of the lower court refusing to transfer the action was made and entered in July, 1903, and it is now too late to raise any question as to the regularity of this ruling. In fact, this appeal is prosecuted alone from the judgment rendered in October, 1906, and under no state of case could this court review the error of the character complained of committed in 1903."

It is contended, however, that if the case were a removable one the effect of filing a petition and bond was to divest the jurisdiction of the state court, and this has been said in decisions of this court upon the subject. This does not mean, however, that the right to review the judgment of a state court only by proper proceedings under § 709 of the Revised Statutes

is in anywise altered or modified. When the state court upon the second application refused to remove the case it was the privilege of the railroad company to take a transcript of the record and make an application to file it in the Federal Circuit Court, and if that court sustained its jurisdiction it might have protected the same by injunction against further proceedings in the state courts, or, if the latter court refused to surrender the record, a writ of certiorari could issue to require its transfer to the Circuit Court of the United States, *Chesapeake & Ohio R. R. Co.* v. *McCabe*, 213 U. S. 207 or remaining in the state court after that court refused to remove, it might, after final judgment, have brought the case here for review, but this does not mean that it could have a review of the judgment of the state court when it has failed to invoke the judgment of that court within the time prescribed by the statute of the State for the review of such orders. Under the statute in Kentucky the review of the order refusing to remove could only be had within two years. Within that time the plaintiffs in error could have taken the question to the Kentucky Court of Appeals, and, if the ruling was against it, after final judgment, could have brought the case here for review. But it could not remain in the state court, without any attempt to have the order refusing the removal reviewed within the statutory period, and escape its judgment on the ground that it was void, if against it, because the case was a removable one.

In *Harding* v. *Illinois*, 196 U. S. 78, it was held that a Federal constitutional objection might be waived, so far as having the right of review of a judgment in a state court was concerned, where the record in the case disclosed that the question was not made in the state court by proper procedure or argument in support of the assertion of the Federal question, and the state court had for that reason held the right to review the Federal question waived.

We are of opinion that this case presents no valid exception to the ruling of the state court upon a Federal question duly reserved by some proper form of procedure, as is required by

§ 709 of the Revised Statutes of the United States, in order to be reviewable here.

It follows that the writ of error must be dismissed.

*Dismissed.*

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